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44-2709

Sup Ct

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1940**

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**No. 17**

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID  
W. COMPTON, ET AL., PETITIONERS,

vs.

INDEPENDENCE SHARES CORPORATION, ALFRED  
H. GEARY, FRANK McCOWN, JR., ET AL.

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**No. 18**

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID  
W. COMPTON, ET AL., PETITIONERS,

vs.

THE PENNSYLVANIA COMPANY FOR INSURANCE  
ON LIVES AND GRANTING ANNUITIES

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT

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**PETITION FOR CERTIORARI FILED FEBRUARY 15, 1940.**

**CERTIORARI GRANTED MARCH 25, 1940.**

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INDEX.

	Original	Print
Record from D. C. U. S., Eastern District of Pennsylvania..	1	1
Docket entries .....	1	1
Complaint .....	7	4
I. Jurisdiction and venue .....	7	5
II. Description of plaintiffs .....	8	5
III. Description of defendants .....	10	6
IV. History and method of doing business of defendant companies .....	12	9
V. Violations of Securities Act of 1933; fraud and misrepresentation in the sale of contract certificates .....	17	13

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## INDEX

Record from D. C. U. S., Eastern District of Pennsylvania—  
Continued

## Complaint—Continued

	Original	Print
VI. Proceedings by the Securities and Exchange Commission against Capital Savings Plan, Inc., and Independence Shares Corporation for violations of the Securities Act of 1933.	30	22
VII. Liability of defendant investment companies to subscriber and consequent insolvency.....	30	22
VIII. Necessity for the appointment of a receiver.....	33	24
IX. Prayer .....	36	27
Exhibit "A"—Final decree in Securities and Ex- change Commission vs. Capital Savings Plan, Inc., etc. ....	40	29
Motion for preliminary injunction.....	43	31
Order for hearing .....	45	33
Answer of The Pennsylvania Company for Insurances on Lives and Granting Annuities .....	45	33
Answer of Independence Shares Corporation, etc., et al. I. Jurisdiction and venue .....	56	42
II. Description of plaintiffs .....	57	43
III. Description of defendants .....	59	45
IV. History and method of doing business of de- fendant companies .....	66	50
V. Violations of the Securities Act of 1933.....	71	55
VI. Proceedings by the Securities and Exchange Commission .....	79	61
VII. Liabilities of defendant investment companies to subscriber .....	79	61
VIII. Necessity for the appointment of a receiver... Specimen of agreement: "Independence Trust Shares Purchase Plan—Monthly Payment Plan" .....	86	67
Specimen of agreement: "Independence Trust Shares Purchase Plan—Full-Paid Plan".....	91	71
Motion for dismissal—The Pennsylvania Company for Insurances on Lives and Granting Annuities.....	101	76
Motion for dismissal—Independence Shares Corporation et al. ....	111	81
Statement of evidence .....	112	81
Appearances of counsel .....	113	82
Testimony of Alfred H. Geary: Cross-examination .....	113	82
C. Lampe: Direct examination .....	166	127
Cross-examination .....	171	131
Redirect examination .....	174	134
Agnes Landon: Direct examination .....	175	134
Cross-examination .....	179	138
Redirect examination .....	180	139
Recross-examination .....	180	139

## Record from D. C. U. S., Eastern District of Pennsylvania—

Continued

Statement of evidence—continued

Original Print

Testimony of—Continued:

Anthony Picone:

Direct examination ..... 181 140

Grace Picone:

Direct examination ..... 185 144

J. Fitch:

Direct examination ..... 187 145

Cross-examination ..... 190 147

Redirect examination ..... 192 149

Laura Burdette:

Direct examination ..... 193 150

Cross-examination ..... 205 161

Cosme Balanos:

Direct examination ..... 214 167

Jane T. Balanos:

Direct examination ..... 216 169

Cosme Balanos (recalled):

Direct examination ..... 220 172

Cross-examination ..... 235 185

Redirect examination ..... 242 191

Recross-examination ..... 243 192

Alfred H. Geary (recalled):

Cross-examination ..... 245 194

Discussion ..... 247 195

Alfred H. Geary (resumed):

Cross-examination ..... 253 200

Discussion ..... 255 201

D. K. Porteous:

Cross-examination ..... 264 207

F. C. McCown:

Cross-examination ..... 306 242

J. T. Balanos:

Cross-examination ..... 319 254

Jane T. Balanos (recalled):

Redirect examination ..... 337 269

Raymond McGraw Brandriff:

Direct examination ..... 343 274

Cross-examination ..... 345 276

Discussion ..... 353 283

Alfred H. Geary (recalled):

Cross-examination ..... 373 297

Robert A. Bonner:

Direct examination ..... 378 301

## INDEX

Record from D. C. U. S., Eastern District of Pennsylvania—Continued	Original	Print
Statement of evidence—continued		
Discussion .....	387	309
Balance sheet of February 28, 1939—Independence Shares Corporation .....	418	333
Opinion, sur application for the appointment of a receiver; sur motion to dismiss bill of complaint, Kalodner, D. J. ....	422	336
Order denying motions to dismiss, etc. ....	454	363
Exceptions to order—Independence shares Corporation, etc., et al. ....	454	364
Exceptions of The Pennsylvania Company for Insurances on Lives and Granting Annuities to order. ....	456	365
Amendment to caption and complaint by adding J. H. Van Silver as party plaintiff. ....	457	366
Amendment to caption and complaint by adding James H. Irvin as party plaintiff. ....	458	366
Exception to order—Independence Shares Company, etc. et al. ....	458	367
Exception of The Pennsylvania Company for Insurances on Lives and Granting Annuities to order. ....	459	367
Order, June 2, 1939, restraining and enjoining defendants .....	460	368
Exception to order of June 2, 1939—Independence Shares Company, etc., et al. ....	461	368
Exception—The Pennsylvania Company for Insurances on Lives and Granting Annuities .....	461	369
Notice of appeal—Independence Shares Company, etc., et al. ....	462	369
Notice of appeal—The Pennsylvania Company for Insurances on Lives and Granting Annuities .....	463	370
Statement of points upon which appellants intend to rely—Independence Shares Company, etc., et al. ....	464	371
Statement of points upon which the appellant intends to rely—The Pennsylvania Company for Insurances on Lives and Granting Annuities .....	465	371
Clerk's certificate.....(omitted in printing) .....	467	
Proceedings in U. S. C. C. A., Third Circuit.....	468	373
Petition for supersedeas and stay of proceedings .....	468	373
Joinder in petition for supersedeas .....	474	377
Minute entry of hearing on petition for supersedeas .....	476	378
Order denying petition for supersedeas and stay of proceedings .....	477	379
Minute entry of argument and submission .....	478	379
Opinion, Biggs, J.: .....	479	380
Judgment—Cause No. 7146 .....	487	386
Judgment—Cause No. 7147 .....	488	387
Petition for rehearing .....	489	387
Answer to petition for rehearing .....	490	389
Order denying petition for rehearing—Cause No. 7146 .....	494	391
Order denying petition for rehearing—Cause No. 7147 .....	495	392
Clerk's certificate .....	496	392
Orders allowing certiorari .....	497	393

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action 218

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON,  
R. G. Cadman, James L. Gleason, Samuel Miller, Irene  
R. Randal, Joseph Laky, and Abe Zubraw, James H.  
Irwin, J. H. Seiver,

v.

INDEPENDENCE SHARES CORPORATION, a Pa. Corporation,  
Independence Shares Corporation, a Del. Corp., National  
Plan, Inc., Income Foundation, Inc., Alfred H. Geary,  
Frank McCown, Jr., Robert E. Bonner, Horace M. Barba,  
Eckley B. Coxe, 3d, and The Pennsylvania Company for  
Insurances on Lives & Granting Annuities

Harry Shapiro, Esq., Attorney for Plaintiffs.  
Francis Chapman, Esq., Attorney for National Plan, Inc.  
Highley & Semans, Esqs., Attorney for Income Foundation, Inc.

Robert F. Irwin, Esq., Frank Rogers Donahue, Esq., Attorneys for Independence Shares Corp. of Pa., Frank McCown, Jr., R. E. Bonner, H. M. Barba and E. B. Coxe, 3d.

DOCKET ENTRIES

Mar. 11, 1939. Complaint, filed.

Mar. 11, 1939. Summons exit.

[fol. 2] Mar. 15, 1939. Motion for appointment of Receiver and Order of Court fixing time for hearing, filed.

Mar. 17, 1939. Appearance of Francis Chapman, Esq., for National Plan, Inc., filed.

Mar. 17, 1939. Appearance of Highley & Semans, Esqs., for Income Foundation, Inc., filed.

Mar. 17, 1939. Answer of Income Foundation, Inc., filed.

Mar. 18, 1939. Stipulation of counsel that bill of complaint be dismissed as to Income Foundation, Inc., filed.

Mar. 18, 1939. Decree dismissing action as to Income Foundation, Inc., filed.

Mar. 20, 1939. Appearance of Robert F. Irwin, Esq., and Frank Rogers Donahue, Esq., for Independence Shares

Corp., (Pa.), Frank McCown, Jr., Robert E. Bonner, Horace M. Barba & Eckley B. Coxe, 3rd, filed.

Mar. 20, 1939. Stipulation of counsel that bill of complaint be dismissed as to National Plan, Inc., filed.

Mar. 20, 1939. Decree dismissing action as to National Plan, Inc., filed. Noted 3/21/39.

Mar. 20, 1939. Answer of National Plan, Incorporated, filed.

Mar. 23, 1939. Summons returned: "on Mar. 16, 1939 served Independence Shares Corp., a Pa. corp; Independence Shares Corp., a Del. Corp.; A. H. Geary; National Plan, Inc.; Frank McCown, Jr.; R. E. Bonner; H. M. Barba; & E. B. Coxe, 3rd; and "service accepted" as to Income Foundation, and Penna. Co., etc., and filed.

[fol. 3] Mar. 23, 1939. Motion by Independence Shares Corp. (Pa.) et al., to dismiss action filed.

Mar. 23, 1939. Motion by Penna. Co., etc., to dismiss action, filed.

Mar. 25, 1939. Motion by Independence Shares Corp. (Pa.) et al. to dismiss action as to Independence Shares Corp. (Del.) filed.

Mar. 25, 1939. Motion by Independence Shares Corp. (Pa.) et al. for order requiring production of certain documents, filed.

Mar. 25, 1939. Brief sur motion of Independence Shares Corp., et al., to dismiss, filed.

Mar. 25, 1939. Brief sur motion of Penna. Co., etc., to dismiss, filed.

Mar. 27, 1939. Argued sur motions to dismiss and motion to strike off return of service as to Independence Shares Corp. of Del. Eo die: Motion to strike off return of service granted.

Mar. 27, 1939. Hearing,—Witness sworn.

Mar. 29, 1939. Transcript of testimony of hearing on Mar. 27, 1939, filed.

Mar. 31, 1939. Hearing resumed.

Apr. 1, 1939. Hearing resumed.

Apr. 3, 1939. Hearing resumed.

Apr. 28, 1939. Hearing resumed.

May 18, 1939. Opinion, Kalodner, J., denying motions to dismiss, continuing application for appointment of Receiver and appointing special master, filed.

May 18, 1939. Decree appointing John M. Hill, Esq., Spe-

cial Master sur question of solvency of Independence Shares Co. (Pa.), filed. 5/19/39 noted and notice mailed.

[fol. 4] May 20, 1939. Motion for preliminary injunction and Order of Court fixing time for hearing, filed. 5/22/39 Noted and notice mailed:

May 24, 1939. Exceptions on behalf of Penna. Co., filed.

May 24, 1939. Argued sur motion for preliminary injunction.

May 25, 1939. Exceptions on behalf of Independence Shares Corp., filed.

May 25, 1939. Plaintiff's amendment to caption by adding J. H. Irvin as party plaintiff and Order of Court approving same, filed. 5/26/39 Noted and notice mailed.

May 25, 1939. Plaintiff's amendment to caption by adding J. H. Van Sciver as party plaintiff and Order of Court approving same, filed. 5/26/39 Noted and notice mailed.

May 27, 1939. Answer of Independence Shares Corp. (Pa.), et al., filed.

May 29, 1939. Stenographer's transcript of hearing of May 24, 1939, filed.

May 31, 1939. Exceptions on behalf of Penna. Co., etc. filed.

May 31, 1939. Answer of Penna. Co., etc., filed.

June 2, 1939. Exceptions by defendants to order of Court adding parties plaintiff filed.

June 2, 1939. Order of Court granting preliminary injunction, filed. 6/3/39 Noted and notice mailed.

June 3, 1939. Injunction bond in \$1,000 with Standard Accident Ins. Co., surety, and Order of Court approving bond, filed.

[fol. 5] June 5, 1939. Notice of Appeal by Independence Shares Corp., et al., filed. 6/7/39 Copy to Harry Shapiro.

June 6, 1939. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

June 8, 1939. Notice of Appeal by Penna. Co., etc., filed. 6/9/39 Copy to Harry Shapiro.

June 8, 1939. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

June 8, 1939. Appeal bond of Penna. Co., etc., in \$250 with Indemnity Ins. Co. of N. A., surety, filed.

June 9, 1939. Order of Special Master requiring Independence Shares Corp. to furnish information as to amounts paid in by plan holders, etc., filed.

June 9, 1939. Order of Special Master requiring Penna.

Co., etc., to furnish information as to amounts paid in by plan holders, etc., filed.

June 15, 1939. Bond of Independence Shares Corp. et al., sur appeal in \$250 with Maryland Casualty Co., surety, filed.

June 15, 1939. Appellant's (Independence Shares Corp., et al.) designation of contents of record on appeal, filed.

June 15, 1939. Statement of points upon which appellants Independence Shares Corp. et al., intend to rely, filed.

June 15, 1939. Exception by Penna. Co. etc., to order of June 2, 1939 granting preliminary injunction, filed.

[fol. 6]. June 15, 1939. Exceptions by Independence Shares Corp. et al., to order of June 2, 1939, granting preliminary injunction; filed.

June 15, 1939. Exception by Independence Shares Corp. et al., to order of Special Master filed June 9, 1939, filed.

June 15, 1939. Petition of Independence Shares Corp. et al., to set aside order of Special Master dated June 9, 1939, filed.

June 16, 1939. Petition of Pennsylvania Co. etc. for review of order of Special Master filed.

June 16, 1939. Appellant's (Penna. Co.) designation of contents of record on appeal filed.

June 16, 1939. Statement of points upon which appellant Penna. Co. etc. intends to rely filed.

July 10, 1939. Appellees' Supplemental Designation of record, filed.

July 11, 1939. Appellant's additional designation of contents of record on appeal, filed.

[fol. 7]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT—Filed March 11, 1939

To the Honorable, the Judges of the Said Court:

The plaintiffs above named, on behalf of themselves and all other certificate holders and plan holders of the defendant investment companies who may, with plaintiffs' consent, lawfully join herein, bring this civil action against the defendants above named, and complain and allege upon information and belief as follows:

### I. Jurisdiction and Venue

1. This complaint is filed, these proceedings are instituted, and the jurisdiction of this Court exists and is invoked under and by virtue of the general equitable and receivership powers and jurisdiction of this Court, including (but not to the exclusion of other acts and statutes relating to the subject matter of this civil action and the relief herein sought) Section 22 (a) of the Act of Congress of May 27, 1933, entitled the "Securities Act of 1933," as amended and supplemented (Act of May 27, 1933, c. 38, Title 1, § 22 (a), 48 Stat. 86 (a), U. S. C. Title 15, § 77V (a)).

2. The acts and sales hereinafter described, including the hereinafter alleged violations of the said Securities Act of 1933, were and are conceived, carried out and made effective, in whole or in part, within the Eastern District of Pennsylvania. The interstate commerce and trade herein-after recited, in whole or in part, were and are being carried on within the Eastern District of Pennsylvania. All of the defendants either are inhabitants of or have agents in and transact business within the said district.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.

### II. Description of Plaintiffs

4. Robert J. Deckert is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Saving Plan Contract Certificate, No. A-21768, in the sum of \$2000, dated April 4, 1938, purchased by him from Capital Savings Plan, Inc., hereinafter sometimes referred to as "Capital," since merged with and now Independence Shares Corporation (a Pennsylvania corporation), hereinafter sometimes referred to as "Independence," a defendant herein.

5. Roland W. Randal is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-19528, in the sum of \$2000, dated September 3, 1937, and Capital Savings Plan Contract Certificate, No. B-13415, in the sum of \$2000, dated December 6, 1937, purchased by him from Capital, now Independence, a defendant herein.

[fol. 9] 6. David W. Compton is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and

holder of Capital Savings Plan Contract Certificate, No. A-6265, in the sum of \$2000, dated October 9, 1934, purchased by him from Capital, now Independence, a defendant herein.

7. R. G. Cadman is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-10660, in the sum of \$2000, dated June 22, 1936, purchased by him from Capital, now Independence, a defendant herein.

8. James L. Gleason is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-17552, in the sum of \$2000, dated July 27, 1937, purchased by him from Capital, now Independence, a defendant herein.

9. Samuel Miller is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-6025, in the sum of \$2000, dated July 24, 1934, purchased by him from Capital, now Independence, a defendant herein.

10. Irene B. Randal is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. B-7280, in the sum of \$2000, dated July 8, 1935, purchased by her from Capital, now Independence, a defendant herein.

11. Joseph Laky is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. B-8765, in the sum of \$2000, dated July 30, 1936, purchased by him from Capital, now Independence, a defendant herein.

12. Abe Zubrow is a citizen and resident of the State of New Jersey and is the owner and holder of Capital Savings [fol. 10] Plan Contract Certificate, No. A-6188, in the sum of \$2000, dated September 5, 1934, purchased by him from Capital, now Independence, a defendant herein.

### III. Description of Defendants

13. Independence Shares Corporation (a Pennsylvania corporation), hereinbefore and hereinafter sometimes referred to as "Independence," is a trust and investment corporation organized, existing and doing business under

and by virtue of the laws of the Commonwealth of Pennsylvania and is the principal defendant herein. It is the successor by merger to, and has acquired under the said merger all of the assets, liabilities, functions and business of, Capital Savings Plan, Inc., hereinbefore and hereinafter sometimes referred to as "Capital" which was an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Prior to the said merger Independence was a wholly owned subsidiary of Capital; and the officers and directors of the two corporations were substantially the same.

All of the other corporate defendants except the Pennsylvania Company for Insurances on Lives and Granting Annuities are subsidiaries or affiliates of Independence, and all of the individual defendants are officers or directors of Independence.

14. Independence Shares Corporation (a Delaware corporation) is an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware and is an affiliate or subsidiary of Independence. Plaintiffs have no knowledge or means of knowledge of the exact relationship between Independence Shares Corporation (a Delaware corporation) and Independence, except that the registration statement filed by Independence with the Securities and Exchange Commission pursuant to the Securities Act of 1933 recites, inter alia, that Independence Shares Corporation (a Delaware [fol. 11] corporation) assigned to Independence all of its right, title and interest in and to all benefits and obligations arising out of certain agreements and declarations of trust between it and the Pennsylvania Company for Insurances on Lives and Granting Annuities dealing with certain investment shares.

15. National Plan, Inc., is an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania and is an affiliate or subsidiary of Independence. Plaintiffs have no knowledge or means of knowledge of the exact relationship between National Plan, Inc., and Independence except that the registration statement filed by Independence with the Securities and Exchange Commission pursuant to the Securities Act of 1933 recites, inter alia, that National

Plan, Inc., assigned to Independence all of its right, title and interest in and to all benefits and obligations arising out of certain agreements and declarations of trust between it and the Pennsylvania Company for Insurances on Lives and Granting Annuities dealing with certain investment shares.

16. Income Foundation, Inc., is an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland and is duly registered in Pennsylvania, and is an affiliate or subsidiary of Independence. Plaintiffs have no knowledge or means of knowledge of the exact relationship between Income Foundation, Inc., and Independence except that the registration statement filed by Independence with the Securities and Exchange Commission pursuant to the Securities Act of 1933 recites, inter alia, that Income Foundation, Inc., assigned to Independence all of its right, title and interest in and to all benefits and obligations arising out of certain declarations of trust and agreements between it and the Pennsylvania Company for Insurances on Lives and Granting Annuities dealing with certain investment shares.

[fol. 12] 17. Alfred H. Geary, a citizen of Pennsylvania and resident of Rosemont, Pennsylvania, is a director and president and chief executive officer of Independence.

18. Frank McCown, Jr., a citizen of Pennsylvania and resident of Wayne, Pennsylvania, is a director and vice-president of Independence.

19. Robert A. Bonner, a citizen of Pennsylvania and resident of Upper Darby, Pennsylvania, is a director and secretary, treasurer, and chief financial and accounting officer of Independence.

20. Horace M. Barba, a citizen of Pennsylvania and resident of Philadelphia, Pennsylvania, is a director of Independence.

21. Eckley B. Coxe, 3d, a citizen of Pennsylvania and resident of Haverford, Pennsylvania, is a director of Independence.

22. The Pennsylvania Company for Insurances on Lives and Granting Annuities, hereinafter sometimes referred to as "Trustee" is a banking corporation organized, existing

and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania, and is Trustee as hereinafter more fully set forth under several agreements between the Trustee and the defendant investment companies under which certificates and plans were sold to your complainants and other subscribers.

#### IV. History and Method of Doing Business of Defendant Companies

23. From and after January 1932, the trust investment companies hereinbefore named, to wit, Capital, Independence, Independence Shares Corporation (a Delaware corporation); Income Foundation, Inc., and National Plan, Inc., [fol. 13] issued and sold to subscribers certain securities generally known and denominated as "contract certificates." The contract certificates sold by Capital were and are known as "Capital Savings Plan Contract Certificates." The contract certificates sold by Independence were and are known as "Independence Trust Shares Purchase Plans." Complainants have no knowledge or means of knowledge of the exact names of the contract certificates issued by the defendants National Plan, Inc., and Income Foundation, Inc.

Each said investment trust company with respect to the contract certificates sold by it is hereinafter referred to as "sponsor."

24. These certificates are monthly payment plans issued and sold in unit denominations of \$1200 providing for the payment of ten dollars a month on a periodic or installment basis over a period of ten years. They were and are purchasable in one-half units of \$600 or any multiple thereof. They were and are securable with life insurance policies one of whose provisions is that upon the death of the subscriber the insurance company shall pay to the Trustee in one lump sum the installment payments remaining unpaid, which sum ranges downward on a \$1200 unit certificate, from \$1190 to \$10.

25. The Trustee upon receipt of each periodic installment payment deducted and still deducts certain various fees and charges. The said fees and charges included a service fee of \$60 on a ten dollar per month unit certificate, deducted from the equivalent of the first nine monthly payments; a

Trustee fee of 25¢ per ten dollar payment or fraction thereof, deducted from each monthly payment; and, on installment payment plans with insurance, an insurance fee at a standard or a sub-standard rate, deducted in proportionately decreasing amounts from each monthly payment.

26. The balance thereof, after the said fees and other charges were deducted, was and is used by the Trustee at the direction of the sponsor to acquire from Independence [fol. 14] "Independence Trust Shares" for the account of each subscriber. These shares are interests in a semi-fixed investment trust of which the Trustee is trustee and Independence issuer and depositor of the shares.

Thus, with respect to the contract certificates sold by Independence, Independence was depositor of the said trust shares as well as sponsor of the contract certificates, whereas, with respect to contract certificates sold by the other investment trust companies, Independence was depositor of the said trust shares and the particular investment trust company sponsor of the contract certificates.

27. Each Independence Trust Share represents a 1/1000th interest in a "Deposit Unit" previously created by Independence with funds borrowed or supplied by it. The Deposit Unit consists of one share each of the common stock of forty-two corporations and cash accumulations to the proper proportion of a distribution of capital. The price at which Independence Trust Shares were and are sold to the Trustee for the account of the purchasers of contract certificates was and is not the actual creation cost of each share, but was and is computed upon the last sales price of each of the forty-two common stocks which constitute the Deposit Unit as of the day prior to the date of purchase by the Trustee, plus odd lot brokerage commissions and taxes. There was and is then added an arbitrary charge or load of 9 per cent. and any distributable accumulations then applicable to the Deposit Unit. This 9 per cent. arbitrary charge was and is divided 1½ per cent. to Independence and 7½ per cent. to the sponsor, and it was and is a source of income to the sponsor through the ten year term in addition to the \$60 service charge which was and is deducted from the first nine payments. Independence Trust Shares were and are subject to an additional charge of 2½ per cent. of currently distributable income and currently distributable principal which charge is deducted semi-annually and paid to the Trustee.

28. The installment investment plan of the several sponsors is in effect a trust upon a trust with two sets of trustees' [fol. 15] fees and with two sets of sponsors' fees, expenses, charges, and other costs of operation deducted from the moneys paid in by the purchasers and from the earnings derived from the underlying common stock in the portfolio of Independence Trust Shares. The Independence Trust Shares purchased by the Trustee are held in a common portfolio, but the account of each purchaser is credited with the shares or fraction of shares to which he is entitled. At any time the purchaser may demand and receive the Independence Trust Shares which are credited to his account, or the liquidating value thereof in cash. The liquidating value of each share is computed at the bid price maintained by defendant Independence and is based upon the market bid price of the forty-two common stocks underlying the shares plus the applicable portion of the distributable accumulations and less odd lot brokerage commissions and taxes. The price is customarily approximately 10 per cent less than the then offering price of shares.

29. The contract certificates issued by Capital and known as Capital Savings Plan Contract Certificates were issued and sold by Capital during the period from December, 1932 until April 9, 1938.

On April 9, 1938, as a result of proceedings threatened and thereafter instituted by the Securities and Exchange Commission against Capital and Independence, as herein-after more fully recited, the sale of Capital Savings Plan Contract Certificates was discontinued, and on December 31, 1938 as a further result of such proceedings, Capital merged with Independence and thereafter Independence issued and sold Independence Trust Shares Purchase Plans in lieu of the prior offering and sale of Capital Savings Plan Contract Certificates. The two plans are substantially similar and Independence is sponsoring, issuing and selling Independence Trust Shares Purchase Plans with substantially the same selling organization and selling practices of Capital. In addition, Independence absorbed [fol. 16] the assets and liabilities of Capital and assumed the sponsorship of the Capital Savings Plan Contract Certificates theretofore issued by Capital.

30. Your complainants having no knowledge or means of knowledge of determining whether Income Foundation,

Inc., and National Plan, Inc., and Independence Shares Corporation, a Delaware corporation, are presently selling contract certificates. Your complainants have been informed, believe and therefore aver, however, that although the said other corporations are technically in existence, Independence has absorbed their assets, liabilities and functions and is sponsoring the contract certificates formerly issued and sold by such other companies.

31. Your complainants have no knowledge or means of knowledge of the exact number of contract certificates or trust shares issued, sponsored, or deposited by the defendant investment trust companies. Your complainants are informed, however, believe and therefore aver that the approximate number of contract certificates in force on August 31, 1938 was not less than 30,000 on which there had been paid in by subscribers a sum in excess of \$5,000,000. According to a prospectus of Independence issued on January 3, 1939, the liquidating value of the common stocks included in the trust shares purchased by the Trustee from Independence pursuant to the said contract certificates is \$4,750,596.33.

32. Independence and formerly Capital maintained and still maintain offices in Philadelphia and Pittsburgh and have general agencies in Harrisburg, Johnstown, Wilkinsburg, and other cities and political subdivisions of Pennsylvania. They were and are represented, and their certificates were and are offered and sold in defined territories, by junior salesmen, senior salesmen and general agents. [fol. 17] Their sole remuneration was dependent upon commissions, and over-riding commissions based upon the amount of certificates sold, the initial commission being payable only after delivery of the certificates and being contingent thereafter upon receipt by the Trustee of subsequent installment payments. There have been more than 1200 salesmen licensed to sell contract certificates in the Commonwealth of Pennsylvania. Many of these were part time representatives, such as office workers, public employees, factory workers, school teachers and insurance salesmen. As of May 20, 1938, full time and part time representatives totalled approximately 500 persons.

V. Violations of Securities Act of 1933; Fraud and Misrepresentation in the Sale of Contract Certificates

33. Independence and its predecessor Capital, in the sale of savings plan contract certificates and trust shares, by the use and means of instruments of transportation or communication in interstate commerce, and by use of the mails, directly or indirectly, have defrauded and are defrauding your complainants and other subscribers of both money and property by means of untrue statements, misrepresentations and concealments, and omissions to state material facts necessary in order to make the statements, in the light of the circumstances under which they are made, not misleading.

34. The foregoing fraudulent untrue statements, misrepresentations, omissions and concealments were made to your complainants and other subscribers both orally and in writing. They appear, inter alia, in certain sales bulletins entitled "Capital Savings Plan-Burton Bigelow Sales Coaching Clinic—Constructive C. S. P. Salesmanship to C. S. P. Licensed Representatives Only," which were issued by the defendant investment companies to their [fol. 18] sales representatives for use by them in the sale of contract certificates, and in prospectuses, circulars, and advertising material issues by the defendant trust investment companies to subscribers, prospective subscribers and the public generally.

35. Among the said fraudulent, untrue statements, misrepresentations, omissions and concealments so made are the following:

(a) That the Capital Savings Plan is comparable to a savings bank account, but paying a higher rate of interest, whereas in truth and in fact said plan is in no way comparable to a savings bank account, but is a plan of investment in the common stocks which underlie the trust shares and the principal of such investment fluctuates with the rise and fall of the market price for such common stocks.

(1) An illustrative excerpt from Sales Bulletin No. 14 is the following:

"For that prospect who thinks in terms of keeping his funds all in that most liquid of all forms of wealth, viz:

Cash—the following picture-phrasing has been found to be unusually effective:

Well, Mr. Lewis, as you know the accumulation of capital, like an automobile, has three speeds.

Low Gear—is the setting aside of a part of earned income in cash to be preserved intact without earnings or interest. This is the slow speed—because if you set aside \$20 a week for ten years, you would end up with only \$2400.

Second Gear—This is the placing of surplus earnings out at interest such as in a savings bank—only 3 per cent, a year at most and probably only  $2\frac{1}{2}$  per cent a year. Even [fol. 19] at 3 per cent., compounded semi-annually, the deposit of \$10 a month for ten years would equal only \$1397.83. True, this is multiplication of money on a small scale—a faster way to save—but not fast enough for anyone except a very young man.

High Gear—This is the investment of surplus in the shares of solid, substantial and successful American industries where you get safety, plus a triple-source profit, viz:

1. Dividends from earnings.
2. Compounding of earning through reinvestment.
3. Appreciation in basic asset values comparable with the growth of the country and the prosperity of its industries.

This is real triple-leverage multiplication of your savings—principal which all rich men use to get richer—a plan now available to the man of modest income.

Incidentally, this 'Three Speeds of Capital Accumulation' story is a good one to tell a man who is a good prospect for a full-paid plan. (What follows is not strictly an example of picturizing vivid future life situations. I have inserted it at this point; however, because it fits in with the 'Three Speeds of Capital Accumulation' story—and further because so many CSP Representatives have asked for a specific idea which they can use to bag the larger cases. This presentation will positively do the business!!")

(2) Many of your complainants and other subscribers were induced to subscribe in the mistaken belief that the [fol. 20] said plan was a savings plan because of the inclusion of the word "savings" in the title of the contract certificates.

(3) An illustrative excerpt from Sales Bulletin No. 18 is the following:

"What the Prospect Says:-

'I prefer to put my money into the Savings Bank,'  
'I would rather buy Government Bonds.'

What the CSP representative says:

'That's fine, Mr. —. To put your money into (a Savings Bank) (Government Bond) (Baby Bonds) (The Postal Savings System) is a good idea—and if properly done, fits into the average man's savings' program very nicely. But, when we get to studying this matter of capital accumulation, Mr. —, we find that it has three speeds or three gears pretty much like an automobile.

(Tell the Three Gear Story, placing these types of savings media into Second Gear, where they belong. See Bulletin No. 14, page 2, for complete details of the Three Gears Story —.)

(b) That the Pennsylvania Company for Insurances on Lives and Granting Annuities is "in back of" and sponsors the Capital Savings Plan and manages the investment of moneys paid in by purchasers, whereas in truth and in fact such company was not at any time herein mentioned and is not now "in back of," never did and does not now sponsor the plan and never did and does not now manage the in-[fol. 21]vestment of moneys paid in by the purchasers, but merely performs the ministerial act of purchasing trust shares designated by the defendant and thereafter acting as a mere custodian for the shares so purchased without any responsibility or liability whatever, except for its own misconduct as such custodian.

(1) An illustrative excerpt from a circular entitled "Capital Savings Plan, A Trusteed Savings Investment Plan" is the following:

"Your Trustee

The investing of your money is entrusted not to Capital Savings Plan, Inc., but to your Trustee, the Pennsylvania

Company for Insurances on Lives and Granting Annuities,  
Philadelphia."

(2) An illustrative excerpt from Sales Bulletin No. 16  
is the following:

"Eight Methods of Handling Registers

1. Anticipate them.
  2. Agree with the prospect; use the 'Yes, but—' answer.
  3. Postpone the answer to the objection until later, so that it will not interrupt the smooth flow of your sales story.
  4. Interrogate the prospect as to why he thinks his objection is true.
  5. Offset the objection with some compensating advantage.
  6. Capitalize the objection; turn it to your own advantage.
  7. Ignore it, if trivial or insincere.
- [fol. 22] 8. Deny it, vigorously and without apology. The following examples of these eight types of strategy in actual use will give you a better understanding of how to use different strategy for different cases:

1. Anticipate Them

The best of all answer to an objection is that which is given before the objection is made. An objection answered in advance loses its power to slow up a sale. To anticipate objections requires some experience and considerable advance planning of your sales presentation.

Salesman: "You are anxious to know, Mr. —, what guarantees protect you in your carrying out a Capital Savings Plan Contract. You have Five guarantees, each made by those not connected with your company directly. (Here give the three guarantees—Safety, Liquidity, Earnings and the two additional guarantees made possible by the Trustees, viz:)

The Trustee guarantees that if you carry your contract to maturity, you will never pay in more than \$1200, and that you will never receive less than \$2,000 as its matured value.

This kind of talk heads off objections such as:  
'It isn't safe' or 'What guarantee do I have?' etc."

(4) An illustrative excerpt from Sales Bulletin No. 47  
is as follows:

"What the Prospect Says:

'If I buy it, will you personally guarantee it?'

[fol. 23] What the CSP Representative Says:

'You bet I will—and I'll do something better than that.  
I'll show you how you get five guarantees—every one of  
them better than mine.'

'Your guarantee of absolute safety is the continued opera-  
tion of these strong American companies, the average age of  
which is 55 years.'

'Your guarantee of liquidity is the continued operation  
of the stock exchanges. These are open every business day  
and offer and maintain a market in these standard Ameri-  
can securities.'

'Your guarantee of profit is the continued earnings of  
these 42 strong American companies in which your money  
is invested.'

'The trust agreement with the Trustee, The Pennsylvania  
Company, guarantees that if you carry your contract to  
completion and get all its benefits, you cannot possibly  
invest more than \$1200 for each \$2000 maturity.'

'The Trustee's agreement likewise guarantees you that  
you will never get less than \$2000 upon the maturity of  
your Plan.'

'Now, Mr. —, with those five guarantees in front of you  
backed as they are by big, responsible organizations—if you  
still want my personal guarantee—the guarantee of a work-  
ing man like yourself—I'll be delighted to give it to you!'

[fol. 24] (c) That money paid in by subscribers could be  
withdrawn in full at any time, or after definite periods vari-  
ously represented to be one, two or three years, whereas in  
truth and in fact over 70 per cent of the money paid in dur-  
ing the first nine months under the plan with insurance  
are absorbed by the various fees and deductions herein-  
before set forth under title IV, and the balance is not avail-  
able in cash, but can be secured only by liquidating the  
Independence Trust Shares which have been purchased by  
the Trustee for the account of the purchaser, the liquidating  
price of which is dependent upon the fluctuating market bid  
price of the common stocks which underlie such shares.

(1) An illustrative excerpt from page 22 of a prospectus issued by Capital under date of April, 1935, is the following:

### "Maturity Charts"

Based on the computations made by Standard Statistics Company, Inc., the following table shows the average cash value of a \$10.00 per month Contract at the end of each of the ten years as compared with the amount paid in:

	Paid in	Value
1st year	\$120	\$60.40
2nd year	240	206.78
3rd year	360	374.45
4th year	480	534.95
5th year	600	719.93
6th year	720	1,049.36
7th year	840	1,179.27
8th year	960	1,404.54
9th year	1,080	1,748.75
10th year	1,200	1,948.28

[fol. 25] From the above it is apparent that time is one of the most important factors in the performance of the Plan. Your Contract cannot be expected to offer any substantial return for the first three or four years. Capital Savings Plan is a seven to ten year program and should be considered so by the Investor."

(d) That for each \$1200 paid in the subscriber would receive \$2000 in cash at the end of a definite period variously stated to be from seven to fourteen years and usually stated to be ten years or less, whereas in truth and in fact, it was at all times herein mentioned and now is impossible to predict accurately the worth of the contract certificates at any definite future time as the worth thereof is at all times the liquidating value of the Independence Trust Shares which have been purchased by the Trustee for the account of the subscriber, which is dependent upon the fluctuating market bid price of the common stocks underlying such shares, which facts were not disclosed to subscribers.

(1) An illustrative excerpt from Sales Bulletin No. 16 is the following:

"The Trustee guarantees that if you carry your contract to maturity, you will never pay in more than \$1200, and that you will never receive less than \$2000 as its matured value."

(e) That the subscriber to a contract certificate is guaranteed against loss, whereas in truth and in fact the certificates provide no such guarantee by the defendants, the Trustee or any other person or persons.

(1) An illustrative excerpt from Sales Bulletin No. 17 is the following:

"The trust agreement with the Trustee, the Pennsylvania Company, guarantees that if you carry your contract to [fol. 26] completion and get all its benefits, you cannot possibly invest more than \$1200 for each \$2000 maturity.

"The Trustee's agreement likewise guarantees you that you will never get less than \$2000 upon the maturity of your Plan."

(f) That if the subscriber had begun a Capital Savings Plan at any time from January 10, 1932, to June 10, 1934, he would have had a substantial profit as of February 3, 1937, without disclosing to purchasers that the value of the certificate is dependent upon the fluctuating market bid price of the common stocks underlying the Independence trust shares and that at all times subsequent to January 15, 1938, and at the time of said representation nearly all of Capital's contract certificates theretofore purchased showed substantial losses.

(1) This misrepresentation is illustrated by the Maturity Chart hereinbefore recited under Paragraph 35 (c) (1). These charts appear in all of the advertising material of defendants and were the first sales material shown by the salesmen to the prospective subscribers because of their obviously fraudulent persuasive character. The said charts in addition appear in advertising pamphlets distributed to subscribers and the public.

(g) That the contract certificates with insurance provide that upon the death of the purchaser a lump sum variously stated on unit certificates to be from \$1200 to \$2000 in cash would be immediately payable to the named beneficiary, whereas in truth and in fact the contract of insurance merely provides that upon the death of the purchaser the life insurance company will pay to the Trustee in one [fol. 27] lump sum the installment payments remaining unpaid and does not provide for the payment of any definite amount to the beneficiary under said certificate.

(1) An illustrative excerpt from Sales Bulletin No. 17 is the following:

" \* \* \* You can cite this true-life story, an actual occurrence that happened to Al Affantranger, one of our top-notch new General Agents in the Western Division.

This was a case where Agent Affantranger let a prospect sell him the idea of procrastinating. 'I'll never be able to look that young fellow's mother in the face again,' confesses Al, 'without thinking how if I had been a real salesman, I'd have sold him that second night before Christmas—and the day after Christmas, his mother would have been \$2000 richer. But no—I let him sell me his idea—instead of me selling him my idea.'

The story is this: Affantranger had called on the young fellow who was going to take one unit; he really meant it, too. He was going to take the insurance with it. Well, he pointed out, he needed a little extra money to spend over Christmas. Come back the next pay-day and he would pay up. He was no phony—he would have done just as he promised Al. But the night before Christmas a car smacked into him—and he went West—without CSP—and his mother without the \$2000 she might have had. That procrastination didn't cost Al Affantranger so much—but it cost that boy's mother a lot."

(h) That a contract certificate is a medium of investment and a method for the installment or periodic purchase of [fol. 28] trust shares, under which the purchaser invests, and pays in, a definite sum of money over a definite period, and upon which the purchaser may receive income, profit and appreciation, without disclosing to purchasers that there is deducted from each \$1200 paid in under a Capital Savings Plan installment contract certificate a fee of \$60 to be paid to the defendant Capital out of the first \$90 paid in by the purchaser and a trustee's fee of \$30 to be deducted at the rate of 25¢ from each \$10 payment and in the installment plan with insurance additional deductions for premiums on the insurance of \$5141 for standard risks and \$77.09 for sub-standard risks, which are to be deducted in decreasing amounts from each \$10 payment, starting with 86¢ for standard risks and \$1.29 for sub-standard risks, and without further disclosing that the balance of each \$10 payment remaining after the deductions mentioned above is

used to purchase Independence trust shares at a price determined by adding an arbitrary charge or load of 9 per cent to the market price of the common stocks underlying such shares, plus the customary odd-lot brokerage commissions and taxes, and without further disclosing that the arbitrary charge or load of 9 per cent is divided 1½ per cent to the depositor of the trust shares and 7½ per cent to the sponsor of the contract certificates, and without further disclosing that Independence Trust Shares are subject to an additional charge of 2½ per cent of currently distributable income and currently distributable principal, deducted semi-annually and paid to the Trustee.

(1) An illustrative excerpt from Sales Bulletin No. 18 is the following:

[fol. 29] "What the Prospect Says:

"Why should I pay a service fee at all?"

"What the CSP Representative Says:

"Yet, when you pay the sales person who sold you, the trustee, the operators of CSP—everybody—it costs you only \$60 for each \$2000 maturity."

(2) An illustrative excerpt from a circular entitled "Capital Savings Plan, A Trusteed Savings Investment Plan" is the following:

#### "The Service Fee"

The total service fee to Capital Savings Plan, Inc., is \$60 for each \$2000 maturity value contract (\$10 per month) applied for. This is payable out of deductions made during the first year's payments. The Trustee charges \$3 per year—25 cents per month—for each year the contract is in force, up to and including the first ten years.

If the \$2000 maturity value is not reached in ten years, the Trustee's charges are at the rate of \$2.40 per year for the additional length of time required."

36. Independence and heretofore Capital were and are in violation of the Securities Act of 1933 by the use of the means and instruments of transportation and communication in interstate commerce, and by the use of the mails, and they have obtained, and now are obtaining, money and

property by means of the said fraudulent untrue statements, misrepresentations, omissions and concealments, and other false pretenses.

[fol. 30] VI. Proceedings by the Securities and Exchange Commission Against Capital Savings Plan, Inc., and Independence Shares Corporation for Violations of the Securities Act of 1933.

37. On June 22, 1938, the Securities and Exchange Commission, pursuant to Sections 20 (b) and 22 (a) of the Securities Act of 1933, filed a bill in equity in the District Court of the United States, for the Eastern District of Pennsylvania against Capital and Independence under the caption, "Securities and Exchange Commission, plaintiff, v. Capital Savings Plan, Inc., a corporation, and Independence Shares Corporation, a corporation, defendants," as of June Term, 1938, No. 10043, charging, inter alia, that the defendants were and are engaging in acts and practices which constitute violations of Section 17 (a) of said Act and praying that the defendants be enjoined from violating any provisions of the said Act.

38. On June 23, 1938, the said defendants filed an answer thereto denying the alleged violations but admitting that the Court had jurisdiction and that the bill in equity stated a proper cause of action and consenting that a decree be rendered against them as prayed for in the said bill in equity.

39. Pursuant thereto on June 23, 1938, this Court rendered a decree against the defendants, in the form and manner prayed for by the plaintiff, a copy of which is attached hereto, made part hereof and marked Exhibit "A."

VII. Liability of Defendant Investment Companies to Subscriber and Consequent Insolvency

40. Plaintiffs have been advised by counsel, believe and therefore aver that as a result of the said fraudulent, untrue statements, misrepresentations, omissions and concealments hereinbefore described in Part V hereof, Independence is liable to the subscribers of Capital, Independence, its subsidiaries and affiliates, under and by virtue of Sections 12 and 13 of the Securities Act of 1933 for all

moneys paid in, together with interest thereon, on contract certificates sold or issued within the three years last past.

41. Plaintiffs have been advised by counsel, believe and therefore further aver that irrespective of the cited sections of the Securities Act of 1933, Independence is liable, by reason of the matters hereinbefore alleged, as trustee ex maleficio with respect to all contract certificates sold, irrespective of the said three year limitation or any other time limitation whatsoever, by Capital, Independence, its subsidiaries and affiliates, and that the measure of such liability is the moneys paid in by subscribers together with interest thereon and/or the profits made or earned therewith.

42. The exact amount of such liability of Independence to subscribers, and the number and amount of sales of contract certificates, and the amount paid in on such contract certificates, and the profits made or earned therewith, are exclusively within the knowledge, possession and control of Independence, and until and unless the relief hereinafter prayed for is granted, your complainants and other subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.

Plaintiffs are informed, believe and therefore aver, however, that such liability of Independence to subscribers, exclusive of interest and/or profits, is not less than \$5,000,000.

43. The said liability of Independence to subscribers, but only with respect to Independence Trust Shares sold during the period from September 1, 1935, to June 14, 1938, has been admitted by Independence in a prospectus dated January 3, 1939, on pages 24 and 25, as follows:

[fol. 32] "A contingent liability exists with respect to 1,104,869 Independence Trust Shares sold by the Registrant for the period from September 1, 1935, to June 14, 1938. The actual amount of this contingent liability cannot be accurately determined without unreasonable effort and expense. However, the maximum amount of the contingent liability, as of August 31, 1938, is estimated to be \$3,486,000 which amount represents approximately the amount actually received by the Registrant from the sale of such shares but which amount is estimated without adding interest at the rate of 6 per cent per annum or deducting distributions made to the holders of Trust Shares. Should

the Registrant be required to repurchase Independence Trust Shares pursuant to its contingent liability, the Registrant would, as a result of such repurchase, acquire a beneficial interest in the common stocks underlying the Independence Trust Shares so repurchased. The contingent liability noted in this paragraph does not affect the common stocks underlying Independence Trust Shares."

44. Plaintiffs have been informed, believe and therefore aver that the liability of Independence with respect to Independence Trust Shares sold prior to September 1, 1935, and after June 14, 1938, when added to the said admitted liability of \$3,486,000 of Independence Trust Shares sold during the period of September 1, 1935, to June 14, 1938, exceeds, exclusive of interest and/or profits, the said sum of \$5,000,000.

45. The details of the fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation values of Independence Trust Shares and trust assets held by the Trustee are exclusively within the knowledge, control and possession of Independence, and until and unless the relief herein-after prayed for is granted, your complainants and other [fol. 33] subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.

46. Plaintiffs are informed, believe and therefore aver that a fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation value of Independence Trust Shares and the trust assets held by the Trustee, is not sufficient in amount to pay the liabilities and debts of Independence and that Independence is therefore insolvent.

### VIII. Necessity for the Appointment of a Receiver.

47. The said proceedings by the Securities and Exchange Commission against Capital and Independence have been given widespread and prominent publicity in the public press and otherwise. This publicity has been, and further like publicity will be, adverse and detrimental, and injurious to the business and continued operation of Independence. Moreover, persons interested in or acquainted with financial matters, and the public generally, having become acquainted, by reason of the aforesaid publicity, with

the real method of operation of Independence, its subsidiaries and affiliates, and the excessive fees and charges involved in the purchase of the contract certificates, now believe that the said contract certificates, because of said excessive fees and charges, will not and cannot yield any profit to subscribers.

48. As a result of the said adverse, detrimental and injurious publicity and the other matters, hereinbefore complained of, the sales of Independence Trust Shares Purchase Plans have virtually ceased. Notwithstanding, the expenses, sales, carrying charges and overhead incident to the maintenance of the personnel and offices of Independence have continued and will continue with the obvious result that unless the relief herein prayed for is granted, [fol. 34] the funds, assets and property of Independence will be dissipated, depleted, and wasted, to the irreparable damage and loss of your complainants and all other subscribers.

49. As a result of the matters hereinbefore recited, your complainants and many other subscribers have demanded, and an increasing number of subscribers are presently demanding, and will demand, from Independence, an amount equal to the sums paid in by each subscriber together with interest thereon, but without regard or relation to the limited cash surrender value set forth in the contract certificates.

50. Notwithstanding the obvious and admitted liability of Independence to complainants and other subscribers, Independence has failed and refused and still fails and refuses to make payments of said liability to complainants and other subscribers.

51. As a result of the matters hereinbefore alleged, suits and actions at law and in equity are threatened wherein subscribers will seek to recover in full all of the moneys paid to Independence, its subsidiaries and affiliates, together with interest thereon, but without regard to relation to the limited cash surrender value set forth in the contract certificates.

52. Your complainants have been advised by counsel, believe and therefore aver that any recovery resulting from any threatened actions by individual subscribers will con-

stitute an inequitable preference on behalf of the said litigants and will deprive and tend to deprive all others of their just equity in the distributable funds of Independence; and in any event, as hereinbefore recited, the total aggregate of all of the assets of Independence is not sufficient to pay in full all of the liabilities of Independence including its liability to the said subscribers.

53. The details of the allegations with respect to the business and operations of Independence, its predecessor [fol. 35] Capital, and its subsidiaries and affiliates, are exclusively within the knowledge, control and possession of Independence, and until and unless the relief herein prayed for is granted, your complainants and other subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.

54. Your complainants have been advised by counsel, believe and therefore aver that the appointment of a receiver as hereinafter prayed for is just, necessary and proper for the following reasons:

- (a) Independence is insolvent and unable to meet its debts and liabilities.
- (b) A proper accounting of the assets, transactions, affairs and business of Independence, its predecessor Capital, and its subsidiaries and affiliates, can be properly undertaken and consummated only by a receiver appointed by the Court and not by agencies or accountants dominated by the defendants.
- (c) The appointment of a receiver will prevent a threatened and probable multiplicity of suits.
- (d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets equitably belonging to complainants and other subscribers, and will safeguard and preserve the said assets.
- (e) The appointment of a receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of litigation.
- (f) Independence, as hereinbefore recited, is a trustee ex maleficio and is therefore an improper agency to handle, liquidate or distribute the assets equitably belonging to

complainants and other subscribers. Such liquidation and distribution should be undertaken by an officer or representative of the Court only.

[fol. 36] (g) Complainants and other subscribers have no adequate remedy at law.

### IX. Prayer

Wherefore, plaintiffs pray:

(1) That summonses issue directed to each of said defendants, commanding them to appear herein and answer, under oath, the allegations contained in this complaint and to abide by such orders and decrees as the Court may make in the premises.

(2) That preliminarily until final hearing and perpetually thereafter, a receiver for the defendants, Independence Shares Corporation (a Pennsylvania corporation), Independence Shares Corporation (a Delaware corporation), National Plan, Inc., and Income Foundation, Inc., be appointed with full power and authority, subject to the order of this Court:

(a) to demand, sue for, collect, receive and take into his possession all the property and assets of whatsoever character or description, and wheresoever situate, of the said defendants, and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities under and pursuant to its agreements with the said defendants, and to institute, prosecute, intervene, become party to, or defend suits at law or in equity for the protection, recovery or maintenance of any of the said property and assets.

(b) to make an accounting of the transactions and property of the said defendants and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities.

(c) to make a valuation, appraisal and audit of the assets and property of the said defendants and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 37] (d) to make an investigation into the business, operations and transactions of, and the relationship between

the said defendant, and the relationship of the said defendants to the Pennsylvania Company for Insurances on Lives and Granting Annuities.

(e) to liquidate the said assets and property and to distribute the same among the persons entitled thereto.

(f) to carry on and wind up and liquidate the business and operations of the said defendants.

(g) to employ counsel to aid, advise and assist him in the exercise of his functions and duties.

(h) to make application in any court of competent jurisdiction for the appointment and qualification of such ancillary receivers as may be necessary or advisable to carry out the functions and duties aforesaid.

(i) to receive and deposit such payments as may hereafter from time to time be made by certificate holders and plan Holders; and to segregate all such payments and deposit the same in a special fund separate and apart from any of the other property and assets of the said defendants and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Grapting Annuities.

(j) to determine all moneys due your complainants and other subscribers from the said defendants.

(k) to dissolve according to law, the said defendants after their business has been wound up and their assets liquidated and distributed.

(3) That preliminarily until final hearing and perpetually thereafter, the defendants and each of them, their agents, employees, officers and servants and all other persons, be required and commanded forthwith upon demand of said receiver to deliver up to him all and every part of the property and assets of the said defendants and the said trust assets held by the Pennsylvania Company for insur- [fol. 38] ances on Lives and Granting Annuities in their and each of their possession or control, wheresoever the same may be situate; including the books, records and documents of, concerning or in any way relating to, the business, operations, and transactions of the said defendants.

(4) That preliminarily until final hearing and perpetually thereafter, the defendants and each of them, their agents, employees, officers and servants and all other persons, be enjoined and restrained from selling, transferring, assigning or disposing of, or in any manner interfering with, any of the business, property or assets of the said defendants or the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities, or interfering with the receiver in the performance of his duty or commencing or prosecuting any action in law or otherwise, against the said defendants, or against the Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee of the said trust assets, or against said receiver, without leave of this Court first had and obtained.

(5) That preliminarily until final hearing and perpetually thereafter, the Court grant such other and further relief as the Court may deem proper.

(6) General relief.

Harry Shapiro, Attorney for Plaintiffs.

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[fol. 39] *Duly sworn to by Isidor Ostroff. Jurat omitted in printing.*

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[fol. 40] EXHIBIT "A" TO COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM, 1938

In Equity. No. 10043

SECURITIES AND EXCHANGE COMMISSION, Plaintiff

vs.

CAPITAL SAVINGS PLAN, INC., a Corporation, and INDEPENDENCE SHARES CORPORATION, a Corporation, Defendants

FINAL DECREE

And Now, This Cause coming on to be heard this 23rd day of June, 1938; and John T. Callahan, Esq. and Edward

C. Jaegerman, Esq. personally appearing for the Plaintiff, Securities and Exchange Commission; and George S. Munson, Esq. and Horace M. Barba, Esq. personally appearing for Defendants, Capital Savings Plan, Inc., a Pennsylvania corporation, and Independence Shares Corporation, a Pennsylvania corporation; and after giving due consideration to Plaintiff's Bill of Complaint, filed in this Court, alleging acts and practices which constitute violations of Section 17 (a) of the Securities Act of 1933; and upon further consideration of the joint Answer of the Defendants herein filed in which is admitted the jurisdiction of this Court and that the Bill of Complaint states a proper cause of action; and it further appearing that the Defendants in their joint Answer have consented that a Final Decree may be entered in these proceedings, as prayed for in Plaintiff's Bill of Complaint

Now, Therefore, It Is Ordered, Adjudged and Decreed

That the defendants, and each of them, their officers, agents, employees and sales personnel be perpetually enjoined [fol. 41] joined and restrained from, in the sale of Capital Savings Plan Contract Certificates, Independence Trust Shares, Independence Trust Shares Purchase Plans or any other security by the use of means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, obtaining money or property by means of untrue statements of material facts or omissions to state facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and particularly concerning.

- (a) Any comparison of the operation of the plan to the operation of a savings bank account or other type of deposit account.
- (b) The extent to which and the time or times at which a purchaser may liquidate his securities or otherwise obtain the return of moneys paid in.
- (c) The worth or liquidating value of the security at the end of 10 years or after a total of 120 payments have been completed or at any other time subsequent to the purchase thereof.

(d) The relationship of The Pennsylvania Company for Insurances on Lives and Granting Annuities or any other trustee to the defendants or to the operation of the plan, or the responsibility of such company or any other trustee under the plan.

(e) Any guarantees or assurances of profit or against loss inherent in or attached to the security or any opportunities afforded thereunder.

(f) The life insurance feature of the plan.

(g) The nature and the character of the operation of the plan as a medium of investment or method for the installment or periodic purchase of trust shares or the manner in which moneys paid in thereon by purchasers thereof [fol. 42] are invested in common stocks or the amount and percentage of all charges, fees, commissions, and costs which are deducted from said moneys prior to such investment or from the income or return of principal of such investment.

or any other untrue statements of material facts or other omissions to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they are made not misleading, similar to those specifically set forth above or of similar purport or object.

By the Court.

(S.) Maris J.

[fol. 43] IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—Filed May 20, 1939

And Now, to-wit, this nineteenth day of May, 1939, it appearing from the opinion of the District Court filed May 18, 1939 in the above-entitled matter that it is appropriate and necessary to protect and preserve the status quo of all the property and assets of the defendant Independence Shares Corporation and of all trust assets held by the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities and the right, title and interest of all plan holders in and to the said assets, come the plaintiffs, by their attorney Harry Shapiro, Esq., and move the Court to issue the following preliminary injunctions:

(a) That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be restrained and enjoined from paying over, selling, assigning, crediting, delivering, transferring or otherwise disposing of, to the defendants or any of them, directly or indirectly, in any manner whatsoever, any property, assets, funds, moneys, deposits, credits, stocks, bonds, Independence Trust Shares, Independence Trust Shares Purchase Plans, Capital Savings Plan Contract Certificates, and any and all other contracts, documents, or other matter, in any way dealing with, connected with, or arising out of the said Capital Savings Plan Contract Certificates, the said Independence Trust Shares Purchase Plans, the said Independence Trust Shares, and the trust agreements, and any other agreements between the defendants.

(b) That the defendants and each of them be restrained and enjoined from buying, selling, exchanging, transferring, assigning, liquidating, redeeming or otherwise dealing in or disposing of Capital Savings Plan Contract Certificates, Independence Trust Shares Purchase Plans, the Deposit Units of which Independence Trust Shares represent an undivided interest, Independence Trust Shares and the [fol. 44] shares and stocks making up or constituting the said Deposit Units.

(c) That the defendants and each of them be restrained and enjoined from selling, transferring, paying out, delivering, assigning or otherwise dealing in or disposing of, directly or indirectly, in any manner whatsoever, to any person or persons whatsoever, the property and assets of whatsoever character or description of the defendant Independence Shares Corporation and the trust assets or funds held by the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities under its agreements with the defendant Independence Shares Corporation, its predecessors and subsidiaries and the subscribers to the various trust and savings plans and contracts issued by the said defendant Independence Shares Corporation, its predecessors and subsidiaries.

(d) That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be ordered and directed to segregate all payments made from and after March 11, 1939, the date of the filing of the complaint in

the above-entitled matter, on account of, or under and by virtue of, any trust or savings plans or certificates issued or sold by the defendant Independence Shares Corporation, its predecessors or subscribers.

(e) Such other and further preliminary relief as the Court may deem proper.

(Sgd.) Harry Shapiro, Attorney for Plaintiffs.

[fol. 45] IN UNITED STATES DISTRICT COURT

ORDER FOR HEARING—Filed May 20, 1939

Before KALODNER, J.:

And Now, to wit, this nineteenth day of May, 1939 on consideration of the foregoing motion, the Court fixes Wednesday, May 24, 1939 at 3 P. M., D. S. T. as the time and place for a hearing on the said motion. Notice of the said hearing shall be given to counsel for defendants forthwith.

By the Court.

Attest: (Sgd.) George Brodbeck, Clerk.

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES—Filed May 31, 1939

To the Honorable Judges of Said Court:

Comes Now, The Pennsylvania Company for Insurances on Lives and Granting Annuities one of the defendants in the above entitled cause and for its answer to the bill of complaint heretofore filed against it by the above mentioned complainants defendant answers and says:

This defendant, The Pennsylvania Company for Insurances on Lives and Granting Annuities, is advised by counsel and therefore avers that this Court has no jurisdiction under allegations of the bill filed against this defendant

either under or by virtue of the general equitable powers of the Court or under the Act of Congress entitled "The Securities Act of 1933" as amended and supplemented. This defendant is advised by counsel and avers:

[fol. 46] (A) That there is no basis for equitable relief on behalf of the complainants against this defendant, because if this defendant has any property belonging to the complainants such property can be withdrawn or liquidated immediately upon the instructions of the complainants given as required by their contract certificates and the trust agreement under which they are issued.

(B) If the complainants have any right of action for misrepresentations against the Independence Shares Corporation such cause of action is triable only in a court of law.

(C) Under the various trust agreements, contract certificates and purchase plans referred to in the bill, this defendant is trustee (or as to purchase plans—custodian) of definite property for approximately 20,000 persons, all of whose rights are specifically provided for in said trust agreements, contract certificates or purchase plans and the complainants in this case have no cause of action or any right to interfere between these thousands of cestui que trustent and this defendant as their trustee or custodian.

(D) While this defendant specifically denies any violations on its part of the Securities Act of 1933 as amended and has no knowledge of any violation of said act by any other defendant, this defendant is advised by counsel and therefore avers that the complainants have no right or authority as individuals, even though there had been violations of said act, to file a bill to enforce said act as to other persons, such right being the right of the Securities and Exchange Commission solely.

This defendant, therefore, requests the Court to dismiss the bill at the cost of the complainants.

For further answer to the specific averments of the bill this defendant makes answer as follows:

1. This defendant denies that any jurisdiction of this Court exists under and by virtue of the general equitable [fol. 47] receivership power and jurisdiction of this Court or under Section 22 (a) of the Act of Congress of May 27,

1933, entitled "The Securities Act of 1933" as amended and supplemented, and especially that any jurisdiction of this Court exists generally or under said Act to grant relief against this defendant.

2. Denied. This defendant is informed, believes and therefore avers that no contract certificates or trust shares were issued and sold by the other defendants or any of them in interstate commerce or to persons other than residents of the Commonwealth of Pennsylvania during the period when no registration statement was filed with the Securities and Exchange Commission and this defendant is informed, believes and therefore avers that there have been no violations of the Securities Act of 1933 as amended.

3. It is denied that the matter in controversy exceeds exclusive of interest and costs the sum of \$3000.

4. Admitted, except that the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate, dated April 4, 1938, provided for the payment of the sum of \$1200 over a period of ten years from April 4, 1938 and there has been paid in eight payments of \$10 each, or a total of \$80.

5. Admitted, except the averment that the contract certificates therein referred to are each in the sum of \$1200, which averments are denied. On the contrary, it is averred that said Contract Certificate A-19528 provided for the payment of the sum of \$2400 over a period of ten years from September 3, 1937 and there has been paid in seventeen payments of \$20 each or a total of \$340 and said Contract Certificate No. B-13415 provided for the payment of \$3600 over a period of ten years from December 6, 1937 and there has been paid in sixteen payments of \$30 each, or a total of \$480.

[fol. 48] 6. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$300 over a period of ten years from October 9, 1934 and there has been paid in fifty payments of \$5 each, or a total of \$250. Further averred that on September 16, 1936, November 2, 1938 and January 30, 1939, David W.

Compton made partial withdrawals and received the sums of \$63.71, \$50.00 and \$55.00, respectively, leaving, after deducting withdrawals, a total amount paid in of \$81.29.

7. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from June 22, 1936 and there has been paid in thirty payments of \$10 each, or a total of \$300.

8. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 27, 1937 and there has been paid in eighteen payments of \$10 each, or a total of \$180.

9. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 24, 1934 and there has been paid in forty-three payments of \$10 each, or a total of \$430.

10. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which [fol. 49] averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 8, 1935 and there has been paid in forty-six payments of \$10 each, or a total of \$460.

11. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 30, 1936, and there has been paid in thirty payments of \$10 each, or a total of \$300.

12. Admitted that Abe Zubrow is the owner and holder of Capital Savings Plan Contract Certificate No. A-6188, dated September 5, 1934, but denied that said contract certificate was in the sum of \$2000. On the contrary, it is

averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from September 5, 1934 and there has been paid in fifty payments of \$10 each, or a total of \$500. Further averred that on March 8, 1939 Abe Zubrow made a partial withdrawal and received the sum of \$300, leaving, after deducting withdrawals, a total amount paid in of \$200. This defendant after diligent inquiry has no knowledge whether the said Abe Zubrow was a citizen and resident of the State of New Jersey at the time of the filing of the complaint and demands proof thereof should the same be deemed material. It is averred that at the time Abe Zubrow purchased said contract certificate he was a citizen and resident of Pennsylvania, residing at 432 Wolf Street, Philadelphia, Pa.

13-14. For answer to paragraphs 13 and 14 this defendant refers to answer filed by Independence Shares Corporation and the individual defendants.

15-16. This defendant is advised that since these proceedings have been discontinued as against National Plan, [fol. 50] Inc., and Income Foundation, Inc., it is unnecessary to answer the averments of paragraphs 15 and 16.

17-21. For answer to paragraphs 17 to 21 inclusive this defendant refers to the answer filed by Independence Shares Corporation and the individual defendants.

22. This defendant admits that it is a banking organization organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania, and that it is trustee under certain trust agreements with Capital Savings Plan, Inc. (now Independence Shares Corporation) and with Independence Shares Corporation, including an agreement dated May 1, 1934 under which Capital Savings Plan Contract Certificates were issued to the complainants. This defendant further avers that it is custodian for each of the individual purchasers under Independence Trust Shares Purchase Plans and is trustee under an agreement dated April 2, 1930, as supplemented, with Independence Shares Corporation pursuant to which Independence Trust Shares are issued.

23-32. For answer to paragraphs 23 to 32 inclusive this defendant refers to the answer filed by Independence Shares Corporation and the individual defendants.

33-35. This defendant at no time has participated in the offer or sale to the public of Capital Savings Plan Contract Certificates, Independence Trust Shares or Independence Trust Shares Purchase Plans and avers that except as to the matters hereinafter mentioned the averments of paragraphs 33-35 are peculiarly within the knowledge of the other defendants, and this defendant demands proof thereof upon issue joined between the complainants and said other defendants. This defendant avers that each of the complainants was a resident of the Commonwealth of Pennsylvania or represented himself so to be at the respective [fol. 51] five times of the issuance of his contract certificate, that no interstate commerce was involved in the issuance of contract certificates to them and that not one of the complainants has at any time reported any misrepresentations to this defendant.

36. Denied. This defendant avers that on information and belief no Capital Savings Plan Contract Certificate was sold or issued outside the Commonwealth of Pennsylvania or to any person who was not a resident of the Commonwealth of Pennsylvania or represented himself so to be, and is advised by counsel, believes and therefore avers, that there were no violations by Capital Savings Plan, Inc., of the Securities Act of 1933 as amended in view of subsection 11 of Section 3 of said act. This defendant further avers on information and belief that no Independence Trust Shares were sold by Independence Shares Corporation or Capital Savings Plan, Inc., during the period when Independence Trust Shares were not registered with the Securities and Exchange Commission outside the Commonwealth of Pennsylvania or to any person who was not a resident of the Commonwealth of Pennsylvania or represented himself so to be, and is advised by counsel and therefore avers that under this state of facts there were no violations of the Securities Act of 1933 as amended in the sale of Independence Trust Shares. This defendant has no information which would lead it to believe that there have been any violations of the Securities Act of 1933 since the registration of Independence Trust Shares and Independence Trust Shares Purchase Plans in June of 1938 and therefore denies on information and belief that there have been any violations of the Securities Act of 1933 as amended by Independence Shares Corporation or Capital Savings Plan, Inc., since the effective dates of said registrations.

37-39. For answer to paragraphs 37 to 39 inclusive this defendant refers to the answer filed by Independence Shares Corporation and the individual defendants.

[fol. 52] 40. Denied. This defendant is advised by counsel that under the facts in this case as known to this defendant and its counsel, neither Capital Savings Plan, Inc., nor Independence Shares Corporation is liable to any holder of Capital Savings Plan Contract Certificates nor Independence Trust Shares Purchase Plans, or holder of Independence Trust Shares, under any provision of the Securities Act of 1933 as amended.

41. This defendant is advised that the averments of paragraph 41 state a conclusion of law which need not be admitted or denied.

42. Denied. As averred above this defendant is advised by counsel that there is no such liability as averred.

43. Admitted that the prospectus dated January 3, 1939 for Independence Trust Shares contained the language averred in paragraph 43. This defendant is advised by counsel that no contingent liability whatsoever exists with respect to the number of trust shares mentioned in the prospectus or in connection with any trust shares subsequently sold.

44. For the reasons set forth in paragraph 43 and heretofore, this defendant denies upon the advice and opinion of its counsel that any liability whatsoever exists with respect to any Independence Trust Shares sold.

45. Denied. This defendant avers that it, as Trustee under the Agreement of May 1, 1934, keeps complete and accurate accounts of the number of trust shares held for each and every holder of Capital Savings Plan Contract Certificate; that each of the complainants at all times were and are at liberty to request this defendant to advise them of the number of trust shares so held for them and that certain of the complainants have from time to time made such requests of this defendant which have been complied [fol. 53] with. This defendant further avers that the bid price of Independence Trust Shares is quoted daily in the newspaper so that the complainants can for themselves determine the current value of the trust shares held for them and that under the terms of said Trust Agreement of

May 1, 1934, no Capital Savings Plan Contract Certificate holder is in any way concerned with or interested in the number of trust shares held for other contract certificate holders.

46. This defendant is advised by counsel, believes and therefore avers that the averments of paragraph 46 are irrelevant and immaterial in so far as the trust assets held by this defendant are concerned. This defendant is advised by counsel, believes and therefore avers that under no circumstances can any of the trust assets held by this defendant as Trustee for the benefit of the holders of Capital Savings Plan Contract Certificates, nor any of the trust assets held by this defendant as Trustee for the holders of Independence Trust Shares, nor any of the trust assets held by this defendant as custodian for the purchasers under Independence Trust Shares Purchase Plans, be applied toward the payment of any debts or liabilities of Independence Shares Corporation and that any such application would be a gross breach of the respective trusts and custodianships administered by this defendant.

47-54. The averments of paragraphs 47-54 inclusive are denied in so far as they refer to the necessity or advisability of the appointment of a receiver for any of the trust assets held by this defendant or the advisability of the appointment of a receiver for Independence Shares Corporation. This defendant avers that it has at all times administered the various trusts and custodianships imposed upon it by the various trust agreements, contract certificates and plans strictly in accordance with the terms thereof, and that in so far as the Capital Savings Plan Contract Certificates and Independence Trust Shares Purchase Plans are concerned, it at all times keeps an accurate record [fol. 54] of the exact number of trust shares held from time to time for each and every contract certificate holder or purchaser; that the terms of said contract certificates and plans provide that this defendant is bound to continue its duties so long as the respective contract certificate holders or purchasers are not in default until all required payments have been made; that this defendant is able to administer the duties imposed upon it by said contract certificates and plans by reason of the use of mechanized accounting equipment and that the administration of said trust assets by a

receiver would necessitate great and unjustified cost and expense to contract certificate holders and purchasers; that a very large number of contract certificate holders and purchasers are maintaining their payments and apparently desire to continue to make their payments and investments and that their right to do so would be violated by the appointment of a receiver of the trust assets for the announced purpose of liquidating as set forth in the bill of complaint; that as averred above the trust under which Independence Trust Shares are issued is administered separate and apart from the trusts and custodianships relating to the contract certificates and plans, and there are approximately 1400 registered holders of Independence Trust Shares, the vast majority of whom have no connection or concern whatsoever with these proceedings and that under the terms of the Capital Savings Plan Contract Certificates there is in effect a group life insurance policy insuring some 6800 lives to the extent of some \$5,000,000, all of which insurance would lapse in the event a receiver should be appointed. This defendant further avers that the continuation of the contract certificates and plans for the benefit of the holders and purchasers who desire to continue the same is largely dependent upon the continued conduct of the business of Independence Shares Corporation since that company creates the new units of Independence Trust Shares which this defendant is directed to purchase; and that an appointment of a receiver in these proceedings for Independence Shares [fol. 55] Corporation would prevent the carrying out of the terms and purposes of the contract certificates and plans held by those who do not desire to withdraw or liquidate at this time but who desire to continue to make their payments. This defendant further avers that the appointment of a receiver for the trust assets for the purpose of liquidation would result in liquidation at the present depressed market prices contrary to the desires of a large number of holders of contract certificates and plans and contrary to the desires of a large number of holders of Independence Trust Shares who have no interest or concern with these proceedings.

This defendant, therefore, prays the Court to dismiss this bill at the cost of the complainants and to relegate these complaints and any others similarly situated to their

actions at law, if any they have, against Independence Shares Corporation.

Saul, Ewing, Remick & Saul, By (Sgd.) Francis H. Bohlen, Jr., Attorneys for Defendant, The Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 56] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF INDEPENDENCE SHARES CORPORATION,  
A PENNSYLVANIA CORPORATION, ALFRED H. GEARY, FRANK  
MCGOWAN, JR., ROBERT A. BONER, HORACE M. BARBA AND  
ECKLEY B. COXE, 3d—Filed May 27, 1939

To the Honorable Judges of Said Court:

Comes Now, Independence Shares Corporation, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and Alfred H. Geary, Frank McGowan, Jr., Robert A. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, some of the defendants in the above-entitled cause, and for their answer to the bill of complaint heretofore filed against them therein by Robert J. Deekert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, and Abe Zubrow, the complainants, the defendants jointly and severally answer and say:

I. Jurisdiction and Venue

1. Denied that jurisdiction of this Court exists under and by virtue of the general, equitable and receivership powers and jurisdiction of the Court, and denied, that in this case, Section 22 (a) of the Act of Congress of May 27, 1933, entitled the "Securities Act of 1933," as amended and supplemented, gives this Court jurisdiction.
2. Admitted that the sales to Robert J. Deekert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow took place in Pennsylvania, but the acts referred to and the alleged violations of the Securities Act of 1933 are denied. It is further averred that defendant Independence Shares Corporation, a Delaware corporation,

was dissolved by the State of Delaware on December 12, 1935.

[fol. 57] 3. Denied, that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.

## II. Description of Plaintiffs

4. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate, dated April 4, 1938, provided for the payment of the sum of \$1200 over a period of ten years from April 4, 1938 and there has been paid in eight payments of \$10 each, or a total of \$80.

5. Admitted, except the averment that the contract certificates therein referred to are each in the sum of \$2000, which averments are denied. On the contrary, it is averred that said Contract Certificate No. A-19528 provided for the payment of the sum of \$2400 over a period of ten years from September 3, 1937 and there has been paid in seventeen payments of \$20 each, or a total of \$340, and said Contract Certificate No. B-13415 provided for the payment of \$3600 over a period of ten years from December 6, 1937 and there has been paid in sixteen payments of \$30 each, or a total of \$480.

6. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$600 over a period of ten years from October 9, 1934 and there has been paid in fifty payments of \$5 each, or a total of \$250. Further averred that on September 16, 1936, November 2, 1938 and January 30, 1939, David W. Compton made partial withdrawals and received the sums of \$63.71, \$50 and \$55, respectively, leaving, after deducting withdrawals, a total amount paid in of \$81.29.

7. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000; which [fol. 58] averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from June 22, 1936 and there has been paid in thirty payments of \$10 each, or a total of \$300.

8. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 27, 1937 and there has been paid in eighteen payments of \$10 each, or a total of \$180.

9. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 24, 1934 and there has been paid in forty-three payments of \$10 each, or a total of \$430.

10. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 8, 1935 and there has been paid in forty-six payments of \$10 each, or a total of \$460.

11. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 30, 1936, and there has been paid in thirty payments of \$10 each, or a total of \$300.

[fol. 59] 12. Admitted that Abe Zubrow is the owner and holder of Capital Savings Plan Contract Certificate No. A-6188, dated September 5, 1934, but denied that said contract certificate was in the sum of \$2000. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from September 5, 1934, and there has been paid in fifty payments of \$10 each, or a total of \$500. Further averred that on March 8, 1939, Abe Zubrow made a partial withdrawal and received the sum of \$300, leaving, after deducting withdrawals, a total amount paid in of \$200. These defendants after diligent inquiry have no knowledge whether the said Abe Zubrow is a citizen and resident of the State of New Jersey and demand proof thereof should the same be

deemed material. It is averred that at the time Abe Zubrow purchased said contract certificate he was a citizen and resident of Pennsylvania, residing at 432 Wolf Street, Philadelphia, Pa.

### III. Description of Defendants

13. Admitted that Independence Shares Corporation is a defendant, but denied that it is the principal defendant, and denied that the other corporate defendants are subsidiaries or affiliates of Independence Shares Corporation, a Pennsylvania corporation. On the contrary, it is averred that Independence Shares Corporation, a Pennsylvania corporation has no subsidiaries or affiliates. As to Independence Shares Corporation, of Delaware, it is averred that said corporation was dissolved by the State of Delaware on December 12, 1935. Further denied that Independence Shares Corporation, a Pennsylvania corporation, is or Capital Savings Plan, Inc., was a trust and investment corporation. It is further averred that Independence Shares Corporation is organized for the purposes, as follows:

"To acquire in any manner, hold as investment, guarantee, sell, assigns, transfer, mortgage, pledge, exchange or otherwise dispose of shares, stocks, debentures, bonds, [fol. 60] trust share certificates, certificates of interest or deposit, notes, obligations and securities issued by any corporation or by any trustee, or government or governmental authority, and while the owner thereof to exercise all the rights, powers and privileges of ownership; to establish one or more trust funds by agreement with a trustee or trustees for the benefit of this corporation and/or of holders of trust share certificates or certificates of interest or of deposit in and to such fund or funds; to pledge, deposit, or deliver to a trustee or trustees securities and/or other property for the benefit of this corporation and/or of the holders of such trust share certificates or certificates of interest or of deposit to be issued and/or authenticated by this corporation and/or a trustee or trustees, evidencing the right of the holder of such trust share certificates or certificates of interest or of deposit to participate or share in income from and/or to demand the delivery of such securities so pledged, deposited or delivered, and the accumulated participation or share in income thereon, if any, or the proceeds of the sale thereof, or any part thereof, either upon demand or at some

future certain or uncertain time, upon the terms and conditions contained in the agreement relating to such pledge, deposit or delivery, and the transaction of all lawful business incidental to the foregoing."

and Capital Savings Plan, Inc., was organized for the purpose of

"purchasing, acquiring, investing in, holding, selling and dealing in stocks, bonds, debentures, notes, mortgages, leases, obligations, contracts and other securities or evidences of indebtedness, and the transaction of all such business as is necessary and incidental thereto."

It is further averred that the character of the business carried on by Independence Shares Corporation, of Penn-[fol. 61] sylvania, has been and still is the purchase with its own funds of units, each unit at present consisting of one share of the common stock of the following corporations:

American Gas and Electric Company  
American Telephone and Telegraph Company  
Pacific Lighting Corporation  
Allied Chemical & Dye Corporation  
Allis-Chalmers Manufacturing Company  
American Can Company  
The American Tobacco Company (Class "B" Stock)  
Corn Products Refining Company  
E. I. duPont de Nemours & Company  
Eastman Kodak Company  
General Electric Company  
General Motors Corporation  
International Harvester Company  
Union Carbide and Carbon Corporation  
United States Steel Corporation  
Westinghouse Electric & Manufacturing Company  
F. W. Woolworth Company  
The Atlantic Refining Company  
Standard Oil Company of California  
Standard Oil Company (Indiana)  
Standard Oil Company (New Jersey)  
The Texas Corporation  
The Atchison, Topeka and Santa Fe Railway Company  
The Chesapeake and Ohio Railway Company  
The Pennsylvania Railroad Company

Union Pacific Railroad Company

The Chase National Bank of the City of New York

Continental-Illinois Bank and Trust Company (Chicago)

The First National Bank of Boston

The Manhattan Company (New York)

The National City Bank of New York

Aetna Life Insurance Company (Hartford)

Fidelity-Phenix Fire Insurance Company of New York

Home Insurance Company of New York

Insurance Company of North America (Philadelphia)

[fol. 62] in accordance with an agreement and declaration of trust dated as of April 2, 1930, with The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee (see Exhibit P-30) which units of stocks are deposited with and held by The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, and against each unit of stock said Trustee issued 1000 Independence Trust Shares. These trust shares have been and are being sold to or for the account of holders of installment or fully paid investment plans or contracts, which plans or contracts by their terms require the payments made thereunder to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee or Custodian, to be applied to the purchase of Independence Trust Shares. In addition, Independence Shares Corporation, of Pennsylvania, has been and now is the issuer of Independence Trust Shares Purchase Plans of the installment and full-paid types, pursuant to the terms of which plans the holders thereof authorize and direct the payments made thereunder to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Custodian, to be applied, after deductions, to the purchase of Independence Trust Shares. It is further averred that the character of the business of Capital Savings Plan, Inc., was, prior to April 9, 1938, the issuance and sale of Capital Savings Plan Contract Certificates under a trust agreement dated May 1, 1934, between it and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee (see Exhibit C-14), solely to residents of the Commonwealth of Pennsylvania, pursuant to the terms of which contract certificates the purchaser thereof makes payments to the Trustee and authorizes and directs the Trustee to apply the payments made thereunder, after deductions, to the pur-

chase of Independence Trust Shares. It is further averred that no Capital Savings Plan Contract Certificates have been issued or sold since April 9, 1938, and no contract certificates will be sold in the future.

[fol. 63] 14. Denied that Independence Shares Corporation, a Delaware corporation, is or was an investment and trust corporation organized and existing and doing business under and by virtue of the laws of the State of Delaware, and denied that said Delaware corporation is an affiliate or subsidiary of Independence Shares Corporation, a Pennsylvania corporation. On the contrary, it is averred that Independence Shares Corporation, a Delaware corporation, distributed all of its assets and was dissolved by the State of Delaware on December 12, 1935.

15. Denied. In further answer to this paragraph, defendants aver that on March 20, 1939, this Court entered the following decree dismissing the bill as to National Plan, Inc.

And Now, this 20th day of March, 1939, upon consideration of the stipulation of counsel filed herein this day by Harry Shapiro, Esq., attorney for the plaintiffs named in the above entitled action, and Francis Chapman, Esquire, attorney for National Plan, Incorporated, one of the defendants named therein, which said stipulation recites the following agreed facts: That defendant, National Plan, Incorporated, was joined as a party defendant in the above entitled case through error; That the defendant, National Plan, Incorporated, is not a subsidiary or affiliate of any of the other defendant companies named in the above recited action, nor is the defendant, National Plan, Incorporated, associated with any of the other defendants named therein, except that the defendant The Pennsylvania Company for Insurances on Lives and Granting Annuities is a duly constituted Custodian (formerly known as Trustee), for the said National Plan, Incorporated, under the terms of a certain trust agreement between National Plan Incorporated and The Pennsylvania Company for Insurances on Lives and Granting Annuities, which said agreement is entirely separate and apart from any agreement which the [fol. 64] said The Pennsylvania Company for Insurances on Lives and Granting Annuities may have with any other of the said defendants; That all of the averments in the Bill of Complaint filed alleging insolvency of the defendant,

National Plan, Incorporated, assignment of its right, title and interest to Independence Shares Corporation, and all averments alleging facts, directly or indirectly, detrimental to the defendant, National Plan, Incorporated, or the conduct of its business, are without foundation in fact; and it further appearing that the plaintiffs in the said action, by their attorney, Harry Shapiro, Esq., has consented to and requested the Court to enter an order or decree dismissing the Bill of Complaint herein filed as to the defendant, National Plan, Incorporated, with costs to be paid by the said plaintiffs.

Now Therefore, It Is Ordered and Decreed that the Bill of Complaint is dismissed as to the defendant, National Plan, Incorporated, with costs to be paid by the plaintiffs.

(s) Kalodner, J.

16. Denied. In further answer to this paragraph, defendants aver that on March 18, 1939, this Court entered the following decree dismissing the bill as to Income Foundation, Inc.

And Now, this 18th day of March, 1939, upon consideration of the stipulation of counsel filed herein this day by Harry Shapiro, Esq., attorney for the plaintiffs named in the above entitled action and Edwin W. Semans, Esq., attorney for Income Foundation, Inc., one of the defendants named therein, which said stipulation recites the following agreed facts: That the defendant, Income Foundation, Inc. was joined as a party defendant in the above entitled case through error; That the defendant, Income Foundation, Inc. [fol. 65] is not a subsidiary or affiliate of any of the other defendant companies named in the above recited action, nor is the defendant, Income Foundation, Inc. associated with any of the other defendants named therein, except that the defendant The Pennsylvania Company for Insurances on Lives and Granting Annuities is a duly constituted Trustee for the said Income Foundation, Inc. under the terms of a certain trust agreement between Income Foundation, Inc. and The Pennsylvania Company for Insurances on Lives and Granting Annuities, which said agreement is entirely separate and apart from any agreement which the said The Pennsylvania Company for Insurances on Lives and Granting Annuities may have with any other of the said defendants; that all of the averments in the Bill of Com-

plaint filed alleging insolvency of the defendant, Income Foundation, Inc. assignment of its right, title and interest to Independence Shares Corporation, and all averments alleging facts, directly or indirectly, detrimental to the defendant, Income Foundation, Inc., or the conduct of its business, are without foundation in fact; and it further appearing that the plaintiffs in the said action, by their attorney, Harry Shapiro, Esq., has consented to and requested the Court to enter an order or decree dismissing the Bill of Complaint herein filed as to the defendant, Income Foundation, Inc. with costs to be paid by the said plaintiffs.

Now Therefore, It is ordered and decreed that the bill of complaint is dismissed as to the defendant, Income Foundation, Inc., with costs to be paid by the plaintiffs.

(s) Kalodner, J.

17. Admitted.

18. Admitted.

19. Admitted

[fol. 66] 20. Admitted.

21. Admitted.

22. Admitted, but denied that Independence Shares Corporation, Pennsylvania, is an investment corporation. On the contrary, it is averred that Independence Shares Corporation is a corporation whose functions are as described in paragraph 13 of this answer. Further averred, that the bill has been dismissed as to National Plan, Inc., and Income Foundation, Inc., as more fully appears in paragraphs 15 and 16 of this answer, and further averred that Independence Shares Corporation, of Delaware, was dissolved by the State of Delaware on December 12, 1935.

#### IV. History and Method of Doing Business of Defendant Companies

23. Admitted, but denied that Independence Shares Corporation, Pennsylvania, is a trust investment company. On the contrary, it is averred that Independence Shares Corporation is a corporation whose functions are as described in paragraph 13 of this answer and the averments as to Independence Shares Corporation, of Delaware, Na

tional Plan, Inc., and Income Foundation, Inc., are denied for the reasons set forth in paragraphs 14, 15 and 16 of this answer.

24. Admitted, but denied that Capital Savings Plan Contract Certificates, either with or without life insurance, are now purchasable. It is averred that no Capital Savings Plan Contract Certificates have been purchasable since April 9, 1938. The averments of this paragraph of the bill as to Independence Trust Shares Purchase Plans are admitted, except that it is denied that they were or are purchasable in one-half units of \$600, or that they were or are securable with life insurance policies. Further denied that as to Independence Trust Shares Purchase Plans any payments are made to a Trustee. On the contrary, it is averred [fol. 67] that all payments made on such plans are paid to a custodian, The Pennsylvania Company for Insurances on Lives and Granting Annuities.

25. Admitted as to Capital Savings Plan Contract Certificates, but denied as to Independence Trust Shares Purchase Plans. On the contrary, it is averred that as to such purchase plans no insurance is available and that the fees and expenses are and have been, as set forth in a prospectus of Independence Trust Shares Purchase Plans (see Exhibit C-8) and in the plans themselves, specimen copies of which are attached to and made a part hereof.

26. Denied. On the contrary, it is averred that as to Capital Savings Plan Contract Certificates, the payments made to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, were applied, after deductions of fees and other charges, by the Trustee, at the direction of the holder of the contract certificate, to the purchase of Independence Trust Shares. As to Independence Trust Shares Purchase Plans, it is averred that there is no Trustee, but The Pennsylvania Company for Insurances on Lives and Granting Annuities is the custodian, and the custodian, after the deduction of the fees and charges, as set forth in said prospectus (see Exhibit C-8), applies the payments at the direction of the holder of the purchase plan to the purchase of Independence Trust Shares. It is further averred that Independence Shares Corporation has never sold or sponsored the sale of any contract certificates.

27. Admitted, except it is averred that since February 28, 1939 a deposit unit has consisted of one share of each

of the common stocks of 35 corporations and not 42 corporations, and denied that 9 per cent was an arbitrary load or charge, but on the contrary, it is averred that said 9 per cent represents the value of the services rendered by Independence Shares Corporation in purchasing underlying securities, depositing them with the Trustee, and the creation [fol. 68] and issuance of trust shares and the cost of marketing the same. It is admitted that prior to May 2, 1938, of the said 9 per cent charge, 1½ per cent was retained by Independence Shares Corporation and 7½ per cent was paid to Capital Savings Plan, Inc., for marketing the shares, and it is further averred that as of May 2, 1938 the said charge was reduced to 7½ per cent and from said date to December 31, 1938 was divided 1½ per cent to Independence Shares Corporation and 6 per cent to Capital Savings Plan, Inc., and that since January 1, 1939 all of said 7½ per cent charge has been retained by Independence Shares Corporation, which corporation now performs the functions formerly performed by both corporations. Denied that after February 28, 1939 Independence Trust Shares are subject to an additional charge of 2½ per cent of currently distributable income and currently distributable principal, which charge is deducted semi-annually and paid to the Trustee. On the contrary, it is averred that there is an administration fee as set forth on pages 6 and 7 of said prospectus (See Exhibit C-8), computed in accordance with standard rates fixed by The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, for transactions involved in the administration of the trust during the preceding six months' period, but in no event can such be in excess of the amount of 1¢ semi-annually for each trust share issued and outstanding on February 28th and August 31st of each year. All fees and charges on trust shares are fully explained and set forth in the Independence Trust Shares said prospectus. (See Exhibit C-8.)

28. Denied that the Capital Savings Plan Contract Certificates held by the various complainants constitute in effect a trust upon a trust with two sets of Trustee's fees and with two sets of sponsor's fees. On the contrary, it is averred that Capital Savings Plan Contract Certificates are based upon two distinct trust instruments and involve only one sponsor's fee and two Trustee's fees. These fees are fully set forth in said prospectus (See Exhibit C-8) and in

[fol. 69] paragraph 46 of this answer. Denied that the liquidating value of each Independence Trust Share is computed at the bid price maintained by Independence Shares Corporation and is based upon the market price of the 42 common stocks underlying the shares, plus the applicable portion of the distributable accumulations and less odd-lot brokerage, commissions and taxes. On the contrary, it is averred that the liquidating value or redemption price of trust shares is in no way maintained by Independence Shares Corporation, but is based on the actual market value of the common stocks underlying the shares, and is payable by the Trustee from funds already in its hands. Independence Shares Corporation has the option to purchase any shares surrendered to the Trustee for redemption and Independence Shares Corporation has adopted the practice, when it exercises such option, of purchasing the shares at the creation price, which price is higher than the redemption price, for the reason that brokerage, commissions and taxes are included in the creation price, whereas such items are deducted in calculating the redemption price. Denied that the redemption or liquidating price is customarily approximately 10 per cent less than the then offering price of trust shares. On the contrary, it is averred that the offering price (in which is included the 7½ per cent charge referred to in paragraph 27) is only approximately 9 per cent greater than the redemption or liquidation price.

29. Admitted that Capital Savings Plan Contract Certificates were issued and sold by Capital Savings Plan, Inc., during the period from December 1932 until April 9, 1938. Denied that on April 9, 1938, as a result of proceedings threatened and thereafter instituted by the Securities and Exchange Commission against Capital Savings Plan, Inc., and Independence Shares Corporation, the sale of Capital Savings Plan Contract Certificates was discontinued. On the contrary, it is averred that the sale of Contract Certificates ceased on April 9, 1938 as a result of an understanding between Capital Savings Plan, Inc., Independence [fol. 70] Shares Corporation and the Securities and Exchange Commission. Denied that as a result of the proceedings instituted by the Securities and Exchange Commission, Capital Savings Plan, Inc., merged with Independence Shares Corporation. On the contrary, it is averred that said merger was brought about to simplify operations and

to effect economies in operations entirely apart from the Securities and Exchange Commission proceedings. Admitted that after December 31, 1938 Independence Shares Corporation issued and sold Independence Trust Shares Purchase Plans, and it further averred that Independence Shares Corporation commenced the issuance of Independence Trust Shares Purchase Plans on June 14, 1938, at which time the registration statement was made effective by the Securities and Exchange Commission, and which plans between said date and December 31, 1938 were sold by Capital Savings Plan, Inc. Denied that Independence Trust Shares Purchase Plans are being sold in lieu of the prior offering and sale of Capital Savings Plan Contract Certificates. On the contrary, it is averred that prior to said merger Independence Shares Corporation never had the right to issue Capital Savings Plan Contract Certificates, and that prior to said merger Capital Savings Plan, Inc., never had the right to issue Independence Trust Shares Purchase Plans, and further, that since said merger no right to issue Capital Savings Plan Contract Certificates has existed. Further denied that Independence Shares Corporation has assumed the sponsorship of the Capital Savings Plan Contract Certificates. On the contrary, it is averred that no Capital Savings Plan Contract Certificates have been issued since April 9, 1938, and with respect to the contract certificates theretofore issued, Independence Shares Corporation has undertaken the duty of supplying Independence Trust Shares to the Trustee for Capital Savings Plan Contract Certificate holders, so that the payments made to such Trustee may be invested in trust shares as required under the terms of the contract certificates.

[fol. 71] 30. Denied for the reason that the bill has been dismissed as to Income Foundation, Inc., and National Plan, Inc., as more fully appears in paragraphs 15 and 16 of this answer, and that Independence Shares Corporation, of Delaware, has been dissolved as more fully appears in paragraphs 13 and 14.

31. Denied that Independence Shares Corporation is an investment trust company for the reasons more fully set forth in paragraph 13 of this answer. Further denied that on August 31, 1938, the approximate number of contract certificates in force was not less than 30,000. On the contrary, it is averred that on August 31, 1938, the approximate number of contract certificates then in force was 20,-

000: Denied that the liquidating value of the common stocks held by the Trustee for the holders of trust shares was, as shown by the prospectus dated January 3, 1939, as of August 31, 1938, \$4,750,596.33. On the contrary, it is averred that said prospectus shows said market value as of said date to be \$4,075,596.33.

32. Admitted, except that it is averred that 1200 salesmen referred to were licensed during a period of approximately seven years prior to June, 1938, that the greatest number of salesmen licensed at any one time was 625, and that Independence Shares Corporation had on March 11, 1939, 186 sales representatives.

#### V. Violations of the Securities Act of 1933, Fraud and Misrepresentation in the Sale of Contract Certificates

33. Denied that from May 1, 1934, to April 9, 1938, either Independence Shares Corporation or Capital Savings Plan, Inc., was engaged in interstate commerce, and denied that at any time either Independence Shares Corporation or Capital Savings Plan, Inc., in the sale of trust shares or contract certificates, by the use and means of instruments of transportation or communication in interstate [fol. 72] commerce and by use of the mails, have directly or indirectly defrauded or are defrauding the complainants and other subscribers of both money and property by means of untrue statements, misrepresentations or concealments or omissions to state material facts necessary in order to make the statements in the light of the circumstances under which they are made, not misleading. It is further averred that no Capital Savings Plan Contract Certificates have been sold since April 9, 1938.

34. Denied that Independence Shares Corporation or Capital Savings Plan, Inc., either were or are investment companies for the reasons more fully set forth in paragraph 13 of this answer. Further denied that any fraudulent, untrue statements, misrepresentations, omissions or concealments were made to your complainants or others, either orally or in writing, and denied that the "Capital Savings Plan—Burton Bigelow Sales Coaching Clinic . . ." bulletins were issued to sales representatives for use by them in the sale of contract certificates. On the contrary, it is averred that said bulletins were used only between February and June, 1937, and solely in a course of instruction

of sales representatives to develop salesmanship, and denied that any untrue statements, misrepresentations, omissions and concealments were contained in prospectuses, circulars or advertising material issued by Capital Savings Plan, Inc., or Independence Shares Corporation.

35. Denied that defendants made any fraudulent, untrue statements, misrepresentations, omissions and concealments.

(a) Denied that it was represented that "the Capital Savings Plan is comparable to a savings bank account, but paying a higher rate of interest."

(1) Admitted that this paragraph of the bill of complaint sets forth an excerpt from Sales Bulletin No. 14, but denied that said sales bulletin was used in the sale of Capital [fol. 73] Savings Plan Contract Certificates but was used only in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(2) Denied that the word "savings" in the title of the contract certificates was misleading, and further averred that at all times the holders of the contract certificates were informed as to the facts, nature and character of the contract, and therefore denied that the complainants or other subscribers were misled.

(3) Admitted that this paragraph of the bill of complaint sets forth an excerpt from Sales Bulletin No. 18, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(b) Denied that it was represented that The Pennsylvania Company is "in back of" and sponsors the Capital Savings Plan and manages the investment of moneys paid in by purchasers.

(1) Denied that this paragraph of the bill of complaint correctly sets forth an excerpt from a circular entitled "Capital Savings Plan, a Trusteed Savings Investment [fol. 74] Plan." On the contrary, it is averred that the correct excerpt from said circular is as follows: "Your Trustee. The collecting, investing and protecting of your money are entrusted not to Capital Savings Plan, Inc., but to your Trustee, The Pennsylvania Company for Insurances on Lives and Granting Annuities, Philadelphia." It is further averred that said circular clearly shows the investment of the payments after deductions in Independence Trust Shares.

(2) Admitted that this paragraph of the bill of complaint sets forth an excerpt from Sales Bulletin No. 16, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(4) Admitted that this paragraph of the bill in complaint sets forth an excerpt from Sales Bulletin No. 17, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(c) Denied that it was represented that "money paid in by subscribers could be withdrawn in full at any time, or

[fol. 75] after definite periods variously represented to be one, two or three years."

(1) Admitted that this paragraph of the bill of complaint contains an excerpt from page 22 of a prospectus issued by Capital Savings Plan under date of April, 1935. It is further averred that this maturity chart on its face is a denial of the averment which it is set forth to prove; which shows first year paid in \$120—value \$60.40.

(d) Denied that it was represented that "for each \$1200 paid in the subscriber would receive \$2000 in cash at the end of a definite period variously stated to be from seven to fourteen years and usually stated to be ten years or less."

(1) Admitted that this paragraph of the bill of complaint contains an excerpt from Sales Bulletin No. 16 but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(e) Denied that it was represented "that the subscriber to a contract certificate is guaranteed against loss."

(1) Admitted that this paragraph of the bill of complaint contains an excerpt from Sales Bulletin No. 17, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(f) Denied that it was represented "that if the subscriber had begun a Capital Savings Plan at any time from

January 10, 1932, to June 10, 1934, he would have had a substantial profit as of February 3, 1937," without disclosing to purchasers that the value of the certificate was dependent upon the fluctuating market prices of the common stocks underlying the trust shares, and denied that at all times subsequent to January 14, 1938, all Capital Savings Plan Contract Certificates theretofore purchased showed substantial losses.

(1) Denied that there is any misrepresentation contained in the maturity charts set forth in paragraph 35 (c) (1) of the bill of complaint and denied that said maturity chart has any fraudulent persuasive character.

(g) Denied that it was represented "that the Contract Certificates with insurance provide that upon the death of the purchaser a lump sum, variously stated on unit certificates to be from \$1,200 to \$2,000 in cash, would be immediately payable to the named beneficiary." It is further averred that this paragraph of the bill of complaint is specifically denied by the averments of paragraph 24 of the bill of complaint itself.

(h) Denied that it was represented "that a Contract Certificate is a medium of investment and a method for the installment of periodic purchase of trust shares under which the purchaser invests, and pays in, a definite sum of money over a definite period, and upon which the purchaser [fol. 77] may receive income, profit and appreciation," without full disclosure to purchasers as to sponsor's fees, Trustee's fees, deductions for insurance premium and the charge on Independence Trust Shares. Denied that in the installment plan with insurance, there are additional deductions for premiums on the insurance of \$5141 for standard risks. On the contrary, it is averred that there are additional deductions for premiums on insurance for standard risks of \$51.41. Denied that the charge of 9 per cent which prior to May 2, 1938, was added to the price of the common stocks underlying the Independence Trust Shares and the charge of 7½ per cent after May 2, 1938, was added to the price of the common stocks underlying the Independence Trust Shares was an arbitrary charge. On the contrary, it is averred that each of said charges represents the value of said services rendered by Independence Shares Corporation in purchasing underlying securities, depositing them with Trustee, and the creation and issuance of trust shares and

the cost of marketing the same. It is admitted that prior to May 2, 1938, of the 9 per cent charge, 1½ per cent was retained by Independence Shares Corporation and 7½ per cent was paid to Capital Savings Plan, Inc., but it is averred that as of May 2, 1938, the said charge was reduced to 7½ per cent and from said date to December 31, 1938, was divided 1½ per cent to Independence Shares Corporation and 6 per cent to Capital Savings Plan, Inc., and since January 1, 1939, all of said 7½ per cent charge has been retained by Independence Shares Corporation. The averment that there is an additional charge in Independence Trust Shares of 2½ per cent of currently distributable income and currently distributable principal deducted semi-annually and paid to the Trustee is denied for the reasons more fully set forth in the answer to paragraph 27 of the bill of complaint.

(1) Admitted that this paragraph of the bill of complaint contains an excerpt from Sales Bulletin No. 18, but denied that said sales bulletin was used in the sale of Capital [fol. 78] Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(2) Admitted that this paragraph of the bill of complaint contains an excerpt from a circular entitled "Capital Savings Plan, a Trusteed Savings Investment Plan."

36. Denied that Independence Shares Corporation and Capital Savings Plan, Inc., were and are in violation of the Securities Act of 1933 by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails have obtained and now are obtaining money and property by means of any fraudulent, untrue statements, misrepresentations, omissions and concealments and other false pretenses. On the contrary, it is averred that no Capital Savings Plan Contract Certificates have been sold since April 9, 1938, that since May 1, 1934, no Capital Savings Plan Contract Certificates have ever been sold in interstate commerce or to other than

residents of the Commonwealth of Pennsylvania, and further, Capital Savings Plan, Inc., merged with and became Independence Shares Corporation on December 31, 1938. Further denied that Independence Shares Corporation or Capital Savings Plan, Inc., have committed any violation of the Securities Act of 1933, and have obtained no money or property by means of or have made any fraudulent, untrue statements, misrepresentations, omissions and concealments or other false pretenses.

[fol. 79] VI. Proceedings by the Securities and Exchange Commission Against Capital Savings Plan, Inc., and Independence Shares Corporation for Violations of the Securities Act of 1933

37. Admitted.

38. Admitted.

39. Admitted. It is averred that after said decree the Securities and Exchange Commission on June 14, 1938, made effective a registration statement of Independence Shares Corporation relating to the issuance and sale of Independence Trust Shares, and that at all times referred to in the bill of complaint, Capital Savings Plan, Inc., was and Independence Shares Corporation was and now is doing business under licenses duly issued by the Pennsylvania Securities Commission.

VII. Liabilities of Defendant Investment Companies to Subscriber

40. Defendants are advised by counsel that this paragraph of the bill of complaint states a conclusion of law and therefore requires no denial, but it is denied that there were any fraudulent, untrue statements, misrepresentations, omissions and concealments and therefore that defendants are not liable to complainants or any other subscribers, under and by virtue of Sections 12 and 13 of the Securities Act of 1933.

41. Defendants are advised by counsel that paragraph 41 states a conclusion of law and therefore requires no denial, but it is denied that Independence Shares Corporation is a Trustee ex maleficio with respect to all or any contract certificates sold, and further denied that there is

any liability under either the Securities Act of 1933 or any other law or laws.

[fol. 80] 42. Denied that there is any liability to subscribers in the sum of \$5,000,000 or any other amount whatsoever.

43. Denied that the Independence Shares Corporation prospectus dated January 3, 1939, admits any liability, and it is further denied that there is any contingent liability whatsoever based on fraud, misrepresentations, omissions and concealments.

44. Denied that there is any liability with respect to Independence Trust Shares sold in the sum of \$3,486,000 or \$5,000,000, or any other sums whatsoever.

45. Denied. On the contrary, it is averred that the liquidation value of Independence Trust Shares is and has been at all times available to complainants and other subscribers, either through inquiry at the office of Independence Shares Corporation, at the office of the Trustee, or through regular daily published quotations of the price of Independence Trust Shares published in daily newspapers of general circulation in the City of Philadelphia and in many other daily newspapers published throughout the United States. It is further averred that the fair valuations of the aggregate of the property and assets of Independence Shares Corporation and of the assets held by the Trustee, are fully set forth in the prospectus of January 3, 1939, referred to in paragraph 43 of the bill of complaint. Further denied that Independence Shares Corporation has any affiliates or subsidiaries.

46. Denied that Independence Shares Corporation has any affiliates or subsidiaries. Denied that Independence Shares Corporation is insolvent. On the contrary, it is averred that Independence Shares Corporation is solvent. Denied that the trust assets held by the Trustees are not sufficient to pay the liquidation value of all Independence Trust Shares. On the contrary, it is averred that the trust assets are sufficient to pay all holders of Capital Savings Plan [fol. 81] Contract Certificates in accordance with their respective rights. Denied that the trust assets held by the Trustee for the holders of Capital Savings Plan Contract Certificates and by the Trustee for the holders of Inde-

pendence Trust Shares are assets of Independence Shares Corporation, for the following reasons, respectively: The certificates are issued under the terms of a Trust Agreement dated as of May 1, 1934, between Capital Savings Plan, Inc., The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee (See Ex. P-30), and those persons (therein called investors) who become parties thereto by purchasing said contract certificates. The contract certificates provide for the payment to the Trustee of a certain sum in either ten annual, twenty semi-annual, forty quarterly, or one hundred twenty monthly payments, and are issued either without insurance benefits or with insurance benefits, in which case insurance is carried under a reducing group life insurance policy covering the amount of the unpaid payments. The insurance lapses if the investor becomes in default for a period of sixty days.

All payments are required to be made by the investor directly to the Trustee and the investor authorizes the Trustee to make certain deductions therefrom and to apply the balance of the purchase of Independence Trust Shares in the manner and at the times set forth in the Trust Agreement. The Trust Agreement (see Section 1 of Article II) provides that the Trustee shall purchase the Independence Trust Shares within twenty days at the current market price.

The deductions made from the payments are: (a) the company's service charge of \$60 per \$10 a month certificate, deducted from the first eight or nine monthly payments; (b) the Trustee's fee of 25 cents per \$10 payment or fraction thereof, deducted from each payment; and (c) in the case of contracts with insurance protection, the reducing insurance premium. The application signed by the investor authorizes the Trustee to purchase additional trust [fol. 82] shares, with the distributions upon his trust shares, at the current offering price.

The market or offering price of Independence Trust Shares is calculated by taking the market value of the stocks in the underlying portfolio of Independence Trust shares, plus brokerage and taxes, to which is then added a charge, originally 9 per cent, and since June of 1938  $7\frac{1}{2}$  per cent, and also the proper pro rata share of the distribution fund arising principally from the dividends paid on the stocks in the underlying portfolio. Prior to the merger of Capital Savings Plan, Inc., with Independence Shares

Corporation, this dealer's profit was divided between the two companies and since the merger, the entire profit accrues to Independence Shares Corporation. The profit is realized not only upon the purchases of trust shares with the investor's payments after deductions have been made, but also from the purchase of additional trust shares with the distributions directed to be reinvested. The Trustee pays for the trust shares against the delivery of trust share certificates and the trust share certificates are held by the Trustee in its vaults, registered in its name as Trustee under the Trust Agreement. The Trustee keeps separate records for each investor upon which it notes from time to time the number of trust shares held for the particular investor carried to the third decimal point. The investors are entitled to make either partial or complete withdrawals under their contract certificates, in which event the Trustee either sells their trust shares and remits the net proceeds to the investor, if so desired, transfers and delivers the trust shares themselves to the investor. When the Trustee sells the trust shares, it sold them prior to June of 1938 to Independence Shares Corporation or Capital at the bid prices quoted by Independence Shares Corporation. Since June of 1938, Independence Shares Corporation and Capital have been purchasing trust shares (except in several cases where large blocks of trust shares were offered for sale) at a "creation price," which price represents the cost of creating the trust shares, without the addition of [fol. 83] the 7½ per cent load. Prior to June 1938, the bid price was less than said "creation price," but not more than the price at which the trust shares could be liquidated by surrendering them to the Trustee under the Independence Trust Shares Trust.

Capital, and since the merger, Independence Shares Corporation, have maintained with the Trustee an escrow fund of trust shares principally for the purpose of handling fractional share transactions.

From the above it will be noted that neither Capital, nor Independence Shares Corporation, have any right, title or interest in and to the trust shares held by The Pennsylvania Company from time to time for the benefit of the holders of the contract certificates. Their rights were confined to (a) the service fees deductible from the first 8 or 9 periodic payments; (b) the profits accruing upon the sale of the trust shares to the Trustee from the charge, origi-

nally 9 per cent, now  $7\frac{1}{2}$  per cent; (c) any additional profits which might accrue from purchasing shares at a bid price less than the creation price (this additional profit is now largely eliminated); (d) their interest in the trust share escrow fund with the Trustee.

Independence Shares Corporation at the present time, therefore, has no right, title or interest in and to the Independence Trust Shares held by The Pennsylvania Company for the investors holding a Capital Savings Plan Contract Certificate, but it does have a potential income arising out of the contract certificates so long as it can continue to deal in and create Independence Trust Shares.

Independence Trust Shares are the shares of a semi-fixed investment trust of the unit type. They are created under a trust agreement dated as of April 2, 1930, as amended, between Independence Shares Corporation, a Delaware corporation, as depositor, and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, Independence Shares Corporation, a Pennsylvania corporation, has become successor depositor to the original Delaware corporation.

[fol. 84] Independence Trust Shares are created by the depositor by delivering to The Pennsylvania Company, as Trustee, one share of each of 35 companies (there were originally 50 companies, 15 of which have since been eliminated) now in the so-called portfolio, plus sufficient cash to equalize the distribution fund which arises from the dividends paid upon the underlying shares. Against each such deposit The Pennsylvania Company, as Trustee, delivers to the depositor 1000 Independence Trust Shares registered in its name. The shares of stock of the underlying companies are held by the Trustee in its vaults registered in its name as Trustee under the trust agreement. The Trustee collects the dividends payable upon the shares of stock in the portfolio, and, after making deductions for cost of administering the trust and taxes, makes a semi-annual distribution on April 1 and October 1, in each year, to the registered holders of the trust shares as of February 28, and August 31 in each year.

Any holder of 1000 trust shares may surrender them to the Trustee and upon payment of the transfer charges and taxes receive from the Trustee one share each of each of the underlying companies, and the proper proportion of

the distribution fund. The holder of less than 1000 trust shares may also surrender them to the Trustee upon three days' notice, in which event he is entitled to receive in cash instead of in kind, an amount equivalent to the redemption value, which is figured on the basis of the aggregate bid price of the stocks in the portfolio, less transfer taxes and charges, and plus the proper proportion of the distribution fund. The depositor has the right to purchase such trust shares within the first two days by paying such cash surrender value, and since the trust was organized the depositor has always exercised this right. However, in order to provide a fund for the redemption of less than one unit, should the depositor not exercise its said right, the depositor has lodged with the Trustee a revolving fund consisting of \$2500 in cash and 1000 trust shares to provide [fol. 85] such cash as might be necessary to meet the demands of withdrawing trust share holders.

Under Section III of Article Seven of the trust agreement, the depositor is entitled to charge against the income of the trust in excess of 1½ cents per trust share semi-annually to provide for the cost of administering the trust. The charge recently in effect was 2½ per cent of the distribution fund, all of which was paid over to the Trustee. Under a recent amendment effective on and after March 1, 1939, the administration fee is to be computed in accordance with the standard dates now fixed by the Trustee for transactions involved in the administration of the trust, but in no event is such fee to be in excess of 1 cent semi-annually for each trust share outstanding. All of this charge will be turned over to the Trustee for its services, and the depositor will receive no compensation, as such, from the trust and will pay such expenses as investment counsel and auditing out of its own pocket.

As Independence Shares Corporation sells the trust shares it creates, they are transferred of record into the names of the purchasers and it will be, therefore, noted that Independence Shares Corporation has no right, title or interest in and to any trust share certificates or the underlying portfolio represented thereby which are held by owners other than Independence Shares Corporation. The interest of Independence Shares Corporation in the trust under which Independence Trust Shares are issued is therefore confined to: (a) such trust shares as it may from time to time create or purchase before they are sold (b) its in-

terest in the cash and trust shares held by the Trustee in the revolving fund, and (c) its interest in any distribution payable upon the trust shares in the revolving fund or such trust shares as it may own at the ex-dividend dates. It will be further noted that Independence Shares Corporation has no income from the administration of the trust, and that its income depends upon its ability to continue to create new trust shares and to deal in trust shares so that they may be sold at a profit.

[fol. 86] VIII. Necessity for the Appointment of a Receiver

47. Admitted that the publicity referred to in this paragraph of the bill of complaint, for which publicity the complainants have been largely responsible, is adverse and detrimental to the business and continued operation of Independence Shares Corporation. The remaining averments of this paragraph of the bill of complaint are denied. On the contrary, it is averred that all holders of Capital Savings Plan Contract Certificates have had full knowledge of the method of operation of Independence Shares Corporation and the fees and charges involved in the purchase of contract certificates. Further denied that said fees and charges are excessive and further denied that the public generally believed that said contract certificates will not and cannot yield any profit to subscribers. Further denied that Independence Shares Corporation has any subsidiaries or affiliates.

48. Denied that the sale of Independence Trust Shares Purchase Plans have virtually ceased. On the contrary, it is averred that there is a substantial sale of Independence Trust Shares Purchase Plans and Independence Trust Shares. All other averments of this paragraph of the bill of complaint are denied. On the contrary, it is averred that in the event the relief prayed for by the complainants is granted, that the income of Independence Shares Corporation will cease, and that such relief would result in irreparable damage and loss to complainants and other subscribers.

49. Admitted that complainants Roland W. Randal, R. G. Cadman, James L. Gleason, Samuel Miller, Joseph Laky and Abe Zubrow, have demanded through their counsel an amount equal to the sums paid in by each of them, together with interest thereon, but denied that complain-

ants David W. Compton, Robert J. Deckert and Irene B. Randal have demanded such sums from Independence [fol. 87] Shares Corporation. Further denied that there is any limited cash surrender value.

50. Denied that Independence Shares Corporation is liable or has admitted any liability to complainants and other subscribers, but admitted that Independence Shares Corporation has refused to comply with the demand made by the attorney for complainants Roland W. Randal, R. G. Cadman, James L. Gleason, Samuel Miller, Joseph Laky and Abe Zubrow, but denied that complainants David W. Compton, Robert J. Deckert and Irene B. Randal have made any demand on Independence Shares Corporation.

51. Denied; except as to the present action instituted by your complainants that any other suits or actions at law and in equity have either been commenced or threatened by other holders of Capital Savings Plan Contract Certificates. Further denied that there is any limited cash surrender value.

52. Each and every allegation of this paragraph of the bill of complaint are denied. On the contrary, it is averred that except for the present action no other individual subscribers have brought or threatened actions, and further, that the assets of Independence Shares Corporation are sufficient to pay in full all of the actual liabilities of Independence Shares Corporation, and that Independence Shares Corporation is solvent.

53. Denied. On the contrary, it is averred that full and complete information regarding the details of the business and operation of Independence Corporation and Capital Savings Plan, Inc., were at all times available to your complainants. Further denied that Independence Shares Corporation has any subsidiaries or affiliates.

54. (a) Denied. On the contrary, it is averred that Independence Shares Corporation is solvent and able to meet its debts and liabilities.

[fol. 88] (b) Denied. It is denied that either Independence Shares Corporation or Capital Savings Plan, Inc., have subsidiaries or affiliates. It is further averred that at all times proper accounts of the assets, transactions, affairs

and business of Independence Shares Corporation and Capital Savings Plan, Inc., have been kept and duly filed with the Pennsylvania Securities Commission and the Securities and Exchange Commission, said accounts having been prepared by independent certified public accountants not in any way dominated by the defendants.

(c) Denied. It is denied that a multiplicity of suits have been threatened, and it is further denied that the appointment of a receiver will prevent a threatened and probable multiplicity of suits.

(d) Denied. Denied that there has been any dissipation, depletion and waste of assets equitably belonging to complainants and other subscribers. Further denied that the appointment of a receiver will safeguard and preserve such assets. On the contrary, it is averred that Independence Shares Corporation has always protected, preserved and safeguarded such assets.

(e) Denied that there have been any inequitable preferences. Further denied that the appointment of a receiver would result in the division of assets equitably among the persons entitled thereto without the necessity of litigation. On the contrary, it is averred that the appointment of a receiver would only result in further litigation, and would further deprive other subscribers who are desirous of making additional payments of their rights to do so as provided in said contract certificates.

(f) Denied that Independence Shares Corporation is a Trustee ex maleficio, and denied that liquidation and distribution of the assets equitably belonging to complainants should be undertaken by an officer or representative of the Court only. On the contrary, it is averred that under the [fols. 89-90] terms of the Capital Savings Plan Contract Certificates and the Independence Trust Shares Purchase Plans, The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee and Custodian, respectively, is the only agency which can handle, liquidate or distribute the trust assets equitably belonging to the complainants and other subscribers.

(g) Denied. On the contrary, it is averred that complainants have an adequate remedy at law.

Wherefore, the defendants pray that the bill of complaint be dismissed for the following reasons:

1. This Court has no jurisdiction.
2. The bill of complaint fails to set forth any cause of action.

(Sgd.) Robert F. Irwin, Jr., Attorney for Defendants.

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# Independence Trust Shares Purchase Plan Monthly Payment Plan

No B-

Non-negotiable

Monthly Payment

Non-assignable

This Agreement, made by and between INDEPENDENCE SHARES CORPORATION, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, (hereinafter called "Company"), and

(hereinafter called "Purchaser").

## Witnesseth:

Whereas, Purchaser has made application which the Company has accepted for the delivery to Purchaser of a Plan in this form, and desires to become a party hereto and to appoint THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, (hereinafter called the "Custodian"), as Custodian hereunder for Purchaser.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, and the payments to be made by Purchaser, the parties hereto agree to and with each other as follows:

### Payments

Section 1. Purchaser agrees to pay to the Custodian sums in the aggregate of \$..... in an initial payment of \$.....

representing monthly payments, the receipt whereof is hereby acknowledged; and the balance is not more than..... monthly payments of \$..... each,

the first of such payments to be due on the day of ..... 19..... Payments shall be made promptly when due to Custodian at its office, 403 Commercial Trust Building, Philadelphia, Pa., or at such other place as the Custodian may from time to time designate. Neither the Company nor the Custodian shall be relieved to pay either party, give notice of the date of or receipt for any payment hereunder, and in the event either the Company or Custodian gives any such notices or receipts, such practice may be discontinued at any time.

Section 2. The Custodian is authorized and directed to make the following deductions:-

A. From payments:-

- (1) One-half (1/2) of the first monthly payments allocated \$..... to the Company on account of its creation fee and its service fee, and \$..... to the Custodian.
- (2) From the Company for the balance of its creation fee and for its service payment, \$..... to the Custodian.
- (3) From each of the remaining payments commencing with the monthly payment, \$..... to the Company for its service fee and \$..... to the Custodian.

B. From cash distributions on the Purchaser's Trust Shares:-

- (1) To the Company 4% of all cash distributions applied to the purchase of additional Trust Shares. This deduction will not be made from distributions directed to be remitted.
- (2) After ten years from the date of this Plan (except during the period the Purchaser is making additional payments) to the Custodian 2/10 of 1% per annum, payable semi-annually, of the total agreed payments. This deduction will be made from cash distributions whether remitted or applied to the purchase of additional Trust Shares.

There will also be deducted semi-annually out of the funds for distribution to holders of Independence Trust Shares, prior to receipt of distributions by the Custodian, 2½% of said funds for distribution which will be paid to the Trustee of Independence Trust Shares as its compensation for administering the trust. (See note below.)

C. In case of each transfer and of each partial withdrawal, return of partial withdrawal, complete withdrawal or termination, a Custodian charge of \$1.00 from the proceeds of Trust Shares, unless such amount be furnished to the Custodian.

D. The Purchaser also authorizes the Custodian to deduct from his payments or distributions, or from the proceeds of sale of Trust Shares, whichever is more convenient, any sum or sums it may be required or permitted to pay or reserve for "tax liability" as defined in Section 10.

Section 3. Purchaser authorizes and directs Custodian to apply the balance remaining in the hands of Custodian from each periodic payment, after making the deductions hereinbefore in Section 2 set forth, within two business days from the date upon which it collects such payments to the purchase of Independence Trust Shares, being the Shares of an investment trust of the fixed type, or to the purchase of such Trust Shares or Shares as may be substituted as hereinafter set forth in Section 8 (all hereinafter called "Trust Shares"). The Company agrees to sell or cause the Trust Shares and necessary fractions to be sold to the Purchaser and delivered to the Custodian at the price hereinafter set forth.

Note—Effective on and after March 1, 1939, and subject to further change without notice, this deduction will be a sum computed in accordance with the standard rates now fixed by the Trustee for transactions involved in the administration of the Trust during the preceding six months, but in no event shall the fee be in excess of the amount of one cent semi-annually for each Trust Share issued and outstanding on February 28 and August 31 of each year.

**Collection of  
Distributions on  
Trust Shares and  
the Application  
Thereof**

Section 4. Purchaser authorizes and directs the Custodian to collect all cash distributions made upon his Trust Shares, and unless Purchaser otherwise directs in writing to apply such distributions, after making authorized deductions, within two business days from the date upon which it collects such distributions to the purchase of additional Trust Shares for his account under the terms of this Plan. Any distributions in the form of additional Trust Shares shall be added to those held for the Purchaser by the Custodian and any distributions in form other than cash or Trust Shares shall be sold by the Custodian at such prices, as it may be able to realize therefor and the net proceeds applied to the purchase of additional Trust Shares.

**Rights of the  
Purchaser**

Section 5. **A. Acceleration of Payments**—The Purchaser may make payments in advance in multiples of his regular periodic payments.

**B. Remittance of Cash Distributions**:—The Purchaser may from time to time instruct the Custodian to remit the cash distributions upon his Trust Shares and, having so instructed the Custodian, may subsequently direct that cash be reapplied to the purchase of additional Trust Shares.

**C. Partial Withdrawal**:—The Purchaser may at any time withdraw part of his Trust Shares or direct the Custodian in writing to sell part of his Trust Shares and remit the net proceeds. In any such case the Purchaser shall first deliver this Plan to the Custodian for proper notation thereon. If the Purchaser shall have withdrawn Trust Shares, he shall have the right at any time prior to exercising Right D, upon delivery hereof to the Custodian and the payment to it of a charge of \$1.00, to redeliver to it the shares withdrawn to be held for him hereunder.

**D. Complete Withdrawal**:—The Purchaser may at any time terminate this Plan by surrendering the same to the Custodian with written instructions either to deliver his Trust Shares to or upon his order or to sell his Trust Shares and remit the net proceeds to or upon his order. If the Purchaser instructs the delivery of his Trust Shares, sufficient Trust Shares will be sold to pay all authorized deductions and leave no fractional Trust Shares and the net balance will be paid in cash.

**E. Additional Payments**:—After the Purchaser has completed his agreed payments, he may notify the Custodian in writing if he desires to make 60 additional monthly payments (or periodical equivalent), whereupon he may make such payments or, if he so desire, discontinue making such payments without becoming delinquent. Upon the exercise of this Right E, and while Purchaser is making such additional payments, the deductions therefrom for the Custodian's service fee and the Company's service fee will be the same as the deductions for those fees from the first 60 payments but without any deductions for Company's creation fee.

**F. Continuation of Custodianship**:—After the Purchaser has completed his payments he may permit the Custodian to retain custody of his Trust Shares, either applying distributions to the purchase of additional Trust Shares or remitting the same if Right B is exercised. Right C may thereafter be exercised from time to time and whenever the Purchaser desires to terminate he may do so by exercising Right D.

**G. Increase of Amount of Monthly Payment**:—After the Purchaser has completed his payments he may monthly payments the Purchaser may, subject to the consent of the Company and Custodian, exchange this Plan for a Plan providing for the payment of larger monthly payments in multiples of \$10.00 without the imposition of an additional \$60.00 creation fee, but without adjustment for any other fees or charges already imposed. The new Plan will be dated as of an appropriate date taking into consideration the payments already made and the Purchaser will be credited upon his new Plan with the payments already made upon this Plan.

**Valuation of  
Trust Shares**

Section 6. **A. Whenever under the terms of this Plan Independence Trust Shares are to be purchased, the Company agrees to sell said Independence Trust Shares to the Purchaser and deliver the same to the Custodian at a purchase price to be determined as follows:** The purchase price of one Independence Trust Share shall be determined by adding together the price of each of the stocks then constituting a Deposit Unit underlying said Trust Shares, plus the per rat share of cash in the Distribution account and dividends declared but not yet received applicable to one unit (excluding cash previously set aside for semi-annual distributions and sums reserved for taxes and other purposes), the price of stock dividends, rights and other like distributions received or receivable and not yet sold, plus all customary odd lot brokerage and commissions, taxes and stock exchange service charges, if any, and dividing the sum so obtained by 1000. The price of listed stocks, stock dividends, rights and the like shall be determined by the last sale price at the close of the business day last preceding the day during which the Custodian orders the Trust Shares from the Company as shown by any published quotations in common use among bankers and brokers, and, if there be no record of any sale on that day, then the last sale price on the last preceding business day on which a sale is so published. The price of unlisted stocks, stock dividends, rights and the like is to be determined by the average between the "bid" and "ask" price at the close of the business day last preceding the day on which the Custodian orders the Trust Shares from the Company as quoted to the Company by any reputable broker or dealer dealing in such stocks, plus commissions, if any.

**B. Whenever under the terms of this Plan Independence Trust Shares are to be sold by the Custodian, they shall be sold at a price to be determined in the same manner as the "purchase price" is determined, except that all customary odd lot brokerage, commissions, taxes and stock exchange service charges, if any, shall be deducted, instead of added, in determining the value of one Trust Share. The Company agrees to purchase fractional Trust Shares at such "sale price." If the Custodian is unable to sell any Trust Shares at said sale price, Custodian is authorized to sell or to convert the Trust Shares at the redemption price specified in the Agreement and Declaration of Trust under which Independence Trust Shares are issued. The Company agrees that, to the extent it has**

orders for the purchase of Trust Shares, it will purchase all Trust Shares from the Custodian at the current "purchase price."

C. In the event of substitution of Trust Shares pursuant to Section 8, the purchase price and sale price shall be fixed upon a similar basis, that is, the purchase price and sale price shall differ only as to the addition or subtraction of odd lot brokerage, commissions, taxes and stock exchange service charges, if any. The purchase price shall not include selling commissions to the Sponsor, Distributor or Company.

D. In the event of the suspension of the business of the New York Stock Exchange (which term shall mean the New York Stock Exchange as now constituted, or any other exchange supplementing it as the principal stock exchange in the United States), the Custodian may purchase or sell Trust Shares, and in any such case, Custodian is authorized to conclusively rely upon the Company's quotation of the value, whether on purchase or sale of Trust Shares, or may in its discretion defer purchases and/or sales for such period of time as may in its discretion be necessary.

E. Custodian is at all times authorized to rely upon the purchase price and sale price quoted to it by the Company, or in case of substitution, by the Issuer or Sponsor of the substituted Trust Shares.

*Termination by  
the Company or  
Custodian*

Section 7. So long as the Purchaser continues to make his payments promptly when due neither the Company nor the Custodian may terminate this Plan for twenty years from the date of its issuance, except as hereinafter provided in Section 8. In the event that the Purchaser shall fail to make any payment for a period of one year after the same becomes due, he shall be considered delinquent and thereupon either the Company or the Custodian may terminate this Plan by giving written notice thereof to the Purchaser and the Purchaser shall be required to surrender this Plan to the Custodian. In case this Plan is so terminated, the Custodian may in its discretion (a) either sell the Purchaser's Trust Shares or (b) sell sufficient Trust Shares to pay all authorized deductions and leave no fractional Trust Shares and transfer the full Trust Shares into the name of the Purchaser. Upon surrender of this Plan to the Custodian, it will pay to or upon the order of the Purchaser the net proceeds of his Trust Shares, if sold, less authorized deductions, or deliver to him his full Trust Shares and balance of cash. No interest will be payable by the Custodian upon any funds held by it for the Purchaser pending the surrender of this Plan and the Custodian may in its discretion, if the Purchaser delays the surrender of this Plan for a period of thirty days, mail him at his address noted upon its records either its check for the net proceeds of sale or his Trust Shares or his full Trust Shares with check for cash balance, in either of which events the Purchaser shall have no further rights hereunder.

At the expiration of twenty years from the date hereof, either the Custodian or the Company may (but shall not be required so to do) give the Purchaser notice that he is required to exercise right D as set forth in Section 5 within thirty days of such notice and in default of the exercise of either of said rights within said thirty day period, either the Company or the Custodian may terminate this Plan and the Custodian will then proceed as above provided in the case of delinquency.

Section 8. If at any time the Trust Shares are not available for purchase, or if the Company deems it to the best interest of Purchaser, the Company may substitute (either as to Trust Shares already purchased and to be purchased, or only as to Trust Shares to be purchased), the shares of an investment trust or of an investment company generally comparable to the Trust Shares then purchasable hereunder; provided, however, that before any such substitution may be made, Company shall

(1) Give at least thirty days' notice to Purchaser of the proposed substitution reasonably describing the new Trust Shares and advising the Purchaser that if Purchaser does not approve of such substitution, Purchaser must within thirty days after the date of such notice notify the Custodian in writing that he desires to completely withdraw.

(2) Satisfy Custodian that the current purchase price and current sale price for the substituted Trust Shares can be reasonably established.

(3) In the case of substitution of new Trust Shares for Trust Shares already purchased, Company shall furnish new Trust Shares having an aggregate current purchase price value less all dealer's commissions, at least equal to the aggregate current sale price value of Purchaser's old Trust Shares.

Upon being furnished with a certificate signed by the President or Treasurer of the Company that the Company has complied with the foregoing condition, unless the Custodian within thirty days from the date of the notice of the Company to the Purchaser shall have received from Purchaser a written notice that Purchaser desires to completely withdraw, the Custodian is authorised thenceforth to purchase the substituted Trust Shares and, if old Trust Shares are to be exchanged, to exchange the old Trust Shares for the substituted Trust Shares. The Custodian is hereby authorized to conclusively rely upon the above mentioned certificate of the Company. The right of substitution herein given to the Company may be exercised by it from time to time and as often as it deems necessary. In the event that the substituted Trust Shares have voting rights, the Custodian is authorized to give proxies to the Company or its nominee or nominees.

In the event that the Trust Shares shall not be purchasable for a period of ninety days and the Company fails to make substitution as above provided, the Custodian may, if it finds another medium of investment which it, in its sole discretion, feels it should submit, select the shares of another investment trust or investment company generally comparable to the Trust Shares, in which event Custodian will give written notice to Purchaser of Custodian's willingness to purchase such other Trust Shares, and if, within thirty days from the date of such notice, Purchaser shall give written approval to the Custodian, Custodian will thereafter purchase such other Trust Shares. If the Purchaser fails

within said period of thirty days to give said written approval, the Custodian may conclusively treat such failure as evidence that Purchaser has terminated this Plan, whereupon the Custodian may proceed to the termination of this Plan as in the case of delinquency.

In case the Trust Shares shall not be purchasable for a period of ninety days, and neither the Company nor the Custodian substitutes other Trust Shares as hereinbefore provided, it is agreed that this Plan shall immediately terminate, and in such event Custodian is authorized to proceed to liquidation as in the case of delinquency.

#### Transfers

Section 9. This Plan shall be neither negotiable nor assignable; provided, however, that Purchaser may either

- A. Upon the payment of a charge of \$1.00 to the Custodian transfer his right, title and interest in and to his Trust Shares to another person acceptable to the Company and the Custodian, which person has made application with respect to such transfer for the delivery to him of a Plan similar hereto, or
- B. Transfer his right, title and interest in and to his Trust Shares without any charge to another person, whose only right shall be to exercise the right of complete withdrawal pursuant to the provisions of Section 5.

C. Execute and file with the Custodian a Declaration of Trust in form satisfactory to the Company and the Custodian declaring that Purchaser holds his right, title and interest in and to his Trust Shares for the benefit of another person or persons as therein provided.

Except as herein provided, no such transfer shall be binding upon the Company or the Custodian, and until the Custodian and the Company shall have received written notice of any such permitted transfer, the Custodian and the Company may treat the Purchaser as the sole and only person having any interest under the terms of this Plan or in the Trust Shares.

Section 10. The Custodian shall not be personally liable for any taxes levied or assessed against it with respect to the Trust Shares in its custody hereunder or arising from the income thereof or sale or transfer thereof. The Custodian is authorized to incur any expenses (which term shall include auditing expense and counsel fees) deemed by it necessary or proper in connection with any claim or possible claim for taxes. The term "tax liability" as used in this Plan shall include not only all taxes and possible taxes, with the exception of issuance taxes, but also all such expenses which have been incurred or are likely to be incurred in connection therewith. The Custodian may in its discretion from time to time make deductions to pay or set up reserves for tax liability and may, if deemed necessary, sell Trust Shares to provide funds for the payment of tax liability or for reserves therefor, but upon final adjustment of such tax liability, the Custodian shall make the proper adjustment of any reserve with the Purchaser. The Company agrees to pay all original issuance taxes, if any, imposed in connection with this Plan.

#### Taxes Terms and Conditions of Custodianship

- Section 11.
- A. The Custodian is authorized to commingle the Purchaser's payments and distributions with payments and distributions received from others and deposit the same in a general deposit account or accounts, in its own banking department or in other banks or trust companies, in its name as Custodian for individual Purchasers under Independence Trust Share Purchase Plans.<sup>9</sup> The Custodian is likewise authorized to commingle any or all Trust Shares purchased for the Purchaser with Trust Shares purchased for others; provided, however, that Custodian shall not commingle any certificates representing Trust Shares with its own corporate assets.
  - B. The Custodian is authorized to cause all certificates representing Trust Shares to be registered in its name as Custodian or in the name of its nominee or nominees.
  - C. Custodian shall keep accounts for the Purchaser showing all payments made hereunder, the deductions therefrom, and the proper amount of Trust Shares or fractions thereof held for Purchaser from time to time. The Company and Purchaser shall have the right to inspect said accounts during usual business hours.
  - D. The Custodian assumes no duties or obligations not specifically imposed upon it by this Plan. Without limiting the generality of the foregoing, the Custodian assumes no responsibility for the choice of the investment, the investment policies of the Trust under which the Trust Shares are issued, or for any act or omissions on the part of the Company. The Custodian specifically does not assume the duties of investment ordinarily imposed upon a trustee and its only obligation shall be to administer its custodianship duties as in this Plan specifically set forth. The Custodian assumes no responsibility for the compliance by the Company with any federal or state law relating to the issuance, registration or qualifications of securities, or for the compliance by the Company with any of the rules, regulations or orders of any commission or commissions constituted under any such law. All recitals contained herein shall be construed as those of the Company and not those of the Custodian.
  - E. The Custodian shall have no right to terminate its custodianship under this Plan, until the same is terminated in accordance with the provisions hereof; provided, however, that any company into which the Custodian may be merged or with which it may be consolidated, or any company resulting from any reorganization, merger or consolidation to which Custodian shall be a party, or any company to which the Trust Shares shall be transferred pursuant to an order of any court or by mutual agreement of all of the parties hereto, shall be the successor of the Custodian hereunder and shall be bound by all of the terms hereof without the execution or filing of any paper or any further act on the part of any of the parties hereto.

**Notice**

Section 12. Any notice required to be sent to the Purchaser shall be sufficiently delivered if placed in the United States mail with sufficient postage attached and addressed to the Purchaser at his address as the same is noted upon the records of Custodian. The date of mailing of such notice shall be deemed to be the date of the giving of such notice.

**Authentication**

Section 13. This Plan shall not be valid or binding for any purpose, nor entitle Purchaser to any rights or benefits unless and until the certificate hereon endorsed shall have been executed by the Custodian through one of its Authorized Officers.

**Miscellaneous**

- Section 14.
- A. No agent or other person has the authority to alter or change the terms of this Plan or to bind the Company or the Custodian by any statement written or oral not contained herein.
  - B. Custodian's accounts and records will be audited each month by a Certified Public Accountant duly licensed by the Commonwealth of Pennsylvania satisfactory to Custodian.
  - C. Company, upon the written request by Purchaser, will furnish Purchaser with statements regarding the amount and nature of dividends and distributions for each twelve months' period ending December 31st received by Custodian upon Purchaser's Trust Shares.
  - D. The provisions of this Plan shall be construed according to, and all rights hereunder shall be governed by, the laws of the Commonwealth of Pennsylvania.
  - E. Any reference in this Plan to the masculine gender shall include the feminine and neuter gender.

Purchaser shall become a party to this Agreement by accepting delivery hereof.

In Witness Whereof, the Company has caused this Agreement to be duly executed by the facsimile signature of its President this ..... day of ..... , 19 .....

**Independent Shares Corporation**

By

*Alfred M. Green*  
President

The undersigned hereby agrees to act as Custodian for the Purchaser upon the terms and conditions set forth in this Agreement.

**The Pennsylvania Company for Insurances  
on Lives and Granting Annuities**

By

*Authorised Signer*

99-100

75

# Independence Trust Shares Purchase Plan Full Paid Plan

No BB-  
Non-negotiable

Payment.....  
Non-assignable

This Agreement, made by and between INDEPENDENCE SHARES CORPORATION, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, (hereinafter called "Company"), and

(hereinafter called "Purchaser"),

## Witnesseth:

Whereas, Purchaser has made application, which the Company has accepted, for the delivery to Purchaser of a Plan in this form, and desires to become a party hereto and to appoint THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING, ANNUITIES, (hereinafter called the "Custodian"), as Custodian hereunder for Purchaser.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, and the payments to be made by Purchaser, the parties hereto agree to and with each other, as follows:

### Payment

### Deductions

A. From the payment:—An amount equal to the Company for its creation fee and in lieu of its dealer's commission.

B. From each distribution on the Purchaser's Trust Shares:

(1) To the Company ~~1/2~~ % of all cash distributions applied to the purchase of additional Trust Shares. This deduction will not be made from cash distributions directed to be remitted.

(2) To the Custodian for its services  $2\frac{1}{10}$  of 1% per annum, payable semi-annually, off the total payment made by the Purchaser. This deduction will be made from cash distributions whether remitted or applied to the purchase of additional Trust Shares.

There will also be deducted semi-annually out of the funds for distribution to holders of Independence Trust Shares prior to receipt of distributions by the Custodian  $2\frac{1}{2}\%$  of said funds for distribution, which will be paid to the Trustee of Independence Trust Shares as its compensation for administering the Trust. (See note below.)

C. In case of each transfer and of each partial withdrawal, return of partial withdrawal, complete withdrawal or termination, a Custodian charge of \$1.00 from the proceeds of Trust Shares, unless such amount be furnished to the Custodian.

D. The Purchaser also authorizes the Custodian to deduct from his payment or distributions, or from the proceeds of sale of Trust Shares, whichever is more convenient, any sum or sums it may be required or permitted to pay or reserve for "tax liability" as defined in Section 10.

### Purchase Made From Payment

Section 3. Purchaser authorizes and directs Custodian to apply the balance remaining in the hands of Custodian from the payment, after making the deductions hereinbefore in Section 2 set forth, within two business days from the date on which it collects said payments, to the purchase of Independence Trust Shares, being the shares of an investment trust of the fixed type, which Trust Shares and such other Trust Shares or Shares as may be substituted as hereinafter set forth in Section 8 are all hereinafter called "Trust Shares." The Company agrees to sell or cause the Trust Shares and necessary fractions thereof to be sold to the Purchaser and delivered to the Custodian at the price hereinafter set forth.

### Collection of Distributions on Trust Shares and the Application Thereof

Section 4. Purchaser authorizes and directs the Custodian to collect all cash distributions made upon his Trust Shares, and unless Purchaser otherwise directs in writing to apply such distributions, after making authorized deductions, within two business days from the date upon which it collects such distributions to the purchase of additional Trust Shares for his account under the terms of this Plan. Any distributions in the form of additional Trust Shares shall be added to those held for the Purchaser by the Custodian and any distributions in form other than cash or Trust Shares shall be sold by the Custodian at such prices as it may be able to realize therefor and the net proceeds applied to the purchase of additional Trust Shares.

### Rights of the Purchaser

A. Remittance of Cash Distributions:—The Purchaser may from time to time instruct the Custodian to remit the cash distributions upon his Trust Shares and, having so instructed the Custodian, may subsequently direct that cash be reapplied to the purchase of additional Trust Shares.

Note.—Effective on and after March 1, 1939, and subject to further change without notice, this deduction will be a sum computed in accordance with the standard rates now fixed by the Trustee for transactions involved in the administration of the Trust during the preceding six months, but in no event shall the fee be in excess of one cent semi-annually for each Trust Share issued and outstanding on February 28 and August 31 of each year.

B. Partial Withdrawal.—The Purchaser may at any time withdraw part of his Trust Shares or direct the Custodian in writing to sell part of his Trust Shares and remit the net proceeds. In any such case the Purchaser shall first deliver this Plan to the Custodian for proper notation thereon. If the Purchaser shall have withdrawn Trust Shares, he shall have the right at any time prior to exercising Right C upon delivery hereof to the Custodian and the payment to it of a charge of \$1.00 to redeliver to it the Shares withdrawn to be held for him hereunder.

C. Complete Withdrawal.—The Purchaser may at any time terminate this Plan by surrendering the same to the Custodian with written instructions either to deliver his Trust Shares to or upon his order or to sell his Trust Shares and remit the net proceeds to or upon his order. If the Purchaser instructs the delivery of his Trust Shares, sufficient Trust Shares will be sold to pay all authorized deductions and leave no fractional Trust Shares and the net balance will be paid in cash.

D. Continuation of Custodianship.—To permit the Custodian to retain custody of his Trust Shares, pending partial or complete withdrawal, at his option, until this Plan is terminated at the option of the Custodian or the Company after twenty years from the date hereof.

#### Valuation of Trust Shares

Section 6.

A. Whenever under the terms of this Plan Independence Trust Shares are to be purchased, the Company agrees to sell said Independence Trust Shares to the Purchaser and deliver the same to the Custodian at a purchase price to be determined as follows: The purchase price of one Independence Trust Share shall be determined by adding together the price of each of the stocks then constituting a Deposit Unit underlying said Trust Shares, plus the pro rata share of cash in the Distribution account and dividends declared but not yet received applicable to one unit (excluding cash previously set aside for semi-annual distributions and sums reserved for taxes and other purposes), the price of stock dividends, rights and other like distributions received or receivable and not yet sold, plus all customary odd lot brokerage and commissions, taxes and stock exchange service charges, if any, and dividing the sum so obtained by 1000. The price of listed stocks, stock dividends, rights, and the like, shall be determined by the last sale price at the close of the business day last preceding the day during which the Custodian orders the Trust Shares from the Company as shown by any published quotations in common use among bankers and brokers, and, if there be no record of any sale on that day, then the last sale price on the last preceding business day on which a sale is so published. The price of unlisted stocks, stock dividends, rights, and the like, is to be determined by the average between the "bid" and "ask" price at the close of the business day last preceding the day on which the Custodian orders the Trust Shares from the Company as quoted to the Company by any reputable broker or dealer dealing in such stocks, plus commissions, if any.

B. Whenever under the terms of this Plan Independence Trust Shares are to be sold by the Custodian, they shall be sold at a price to be determined in the same manner as the "purchase price" is determined, except that all customary odd lot brokerage, commissions, taxes and stock exchange service charges, if any, shall be deducted; instead of added, in determining the value of one Trust Share. The Company agrees to purchase fractional Trust Shares at such "sale price." If the Custodian is unable to sell any Trust Shares at said sale price, Custodian is authorized to sell or to convert Trust Shares at the redemption price specified in the Agreement and Declaration of Trust under which Independence Trust Shares are issued. The Company agrees that, to the extent it has orders for the purchase of Trust Shares, it will purchase all Trust Shares from the Custodian at the current "Purchase Price."

C. In the event of substitution of Trust Shares pursuant to Section 8, the purchase price and sale price shall be fixed upon a similar basis, that is, the purchase price and sale price shall differ only as to the addition or subtraction of odd lot brokerage, commissions, taxes and stock exchange service charges, if any. The purchase price shall not include selling commissions to the Sponsor, Distributor or Company.

D. In the event of the suspension of the business of the New York Stock Exchange (which term shall mean the New York Stock Exchange as now constituted, or any other exchange supplanting it as the principal stock exchange in the United States), the Custodian may purchase or sell Trust Shares, and in any such case Custodian is authorized to conclusively rely upon the Company's quotation of the value, whether on purchase or sale of Trust Shares, or may in its discretion defer purchases and/or sales for such period of time as may in its discretion be necessary.

E. Custodian is at all times authorized to rely upon the purchase price and sale price quoted to it by the Company or, in case of substitution, by the Issuer or Sponsor of the substituted Trust Shares.

#### Termination by the Company or Custodian

Section 7. Neither the Company nor the Custodian may terminate this Plan for twenty years from the date of its issuance, except as hereinafter provided in Section 8.

At the expiration of twenty years from the date hereof, either the Custodian or the Company may (but shall not be required so to do) give the Purchaser notice that he is required to completely withdraw within thirty days of such notice and in default of the exercise of either of said rights within said thirty days' period, either the Company or the Custodian may terminate this Plan. In case this Plan is so terminated, the Custodian may in its discretion (a) either sell the Purchaser's Trust Shares or (b) sell sufficient Trust Shares to pay all authorized deductions and leave no fractional Trust Shares and transfer the full Trust Shares into the name of the Purchaser. Upon surrender of this Plan to the Custodian, it will pay to or upon the order of the Purchaser the net proceeds of his Trust Shares, if sold, less authorized deductions, or deliver to him his full Trust Shares and balance of cash. No interest will be payable by the Custodian upon any funds held by it for the Purchaser pending the surrender of this Plan and the Custodian may in its discretion, if the Purchaser delays

the surrender of this Plan for a period of thirty days, mail him at his address noted upon its records either its check for the net proceeds of sale or his Trust Shares, or his full Trust Shares with check for cash balance, in either of which events the Purchaser shall have no further rights hereunder.

**Substitution of  
Trust Shares**

Section 8. If at any time the Trust Shares are not available for purchase, or if the Company deems it to the best interest of Purchaser, the Company may substitute (either as to Trust Shares already purchased, and to be purchased, or only as to Trust Shares to be purchased), the shares of an investment trust or of an investment company generally comparable to the Trust Shares then purchasable hereunder; provided, however, that before any such substitution may be made, Company shall

(1) Give at least thirty days' notice to Purchaser of the proposed substitution reasonably describing the new Trust Shares and advising the Purchaser that if Purchaser does not approve of such substitution, Purchaser must within thirty days after the date of such notice notify the Custodian in writing that he desires to completely withdraw.

(2) Satisfy Custodian that the current purchase and current sale price for the substituted Trust Shares can be reasonably established.

(3) In the case of substitution of new Trust Shares for Trust Shares already purchased, Company shall furnish new Trust Shares having an aggregate current purchase price value less all dealer's commissions, at least equal to the aggregate current sale price value of Purchaser's old Trust Shares.

Upon being furnished with a certificate signed by the President or Treasurer of the Company that the Company has complied with the foregoing conditions, unless the Custodian within thirty days from the date of the notice of the Company to the Purchaser shall have received from Purchaser a written notice that Purchaser desires to completely withdraw, the Custodian is authorized thenceforth to purchase the substituted Trust Shares and, if old Trust Shares are to be exchanged, to exchange the old Trust Shares for the substituted Trust Shares. The Custodian is hereby authorized to conclusively rely upon the above mentioned certificate of the Company. The right of substitution herein given to the Company may be exercised by it from time to time and as often as it deems necessary. In the event that the substituted Trust Shares have voting rights, the Custodian is authorized to give proxies to the Company or its nominees or nominees.

In the event that the Trust Shares shall not be purchased for a period of ninety days and the Company fails to make substitution as above provided, the Custodian may, if it finds another medium of investment which it, in its sole discretion, feels it should submit, select the shares of another investment trust or investment company generally comparable to the Trust Shares, in which event Custodian will give written notice to Purchaser of Custodian's willingness to purchase such other Trust Shares, and if, within thirty days from the date of such notice, Purchaser shall give written approval to the Custodian, Custodian will thereafter purchase such other Trust Shares. If the Purchaser fails within said period of thirty days to give said written approval, the Custodian may conclusively treat such failure as evidence that Purchaser has terminated this Plan, whereupon the Custodian may proceed to the termination of this Plan as in the case of delinquency.

In case the Trust Shares shall not be purchasable for a period of ninety days, and neither the Company nor the Custodian substitutes other Trust Shares as hereinbefore provided, it is agreed that this Plan shall immediately terminate, and in such event Custodian is authorized to proceed to liquidation as in the case of termination.

**Transfers**

Section 9. This Plan shall be neither negotiable nor assignable; provided, however, that Purchaser may either

A. Upon the payment of a charge of \$1.00 to the Custodian, transfer his right, title and interest in and to his Trust Shares to another person acceptable to the Company and the Custodian, which person has made application with respect to such transfer for the delivery to him of a Plan similar hereto, or

B. Transfer his right, title and interest in and to his Trust Shares, without any charge, to another person whose only right shall be to exercise the right of complete withdrawal pursuant to the provisions of Section 5.

C. Execute and file with the Custodian a Declaration of Trust in form satisfactory to the Company and the Custodian declaring that Purchaser holds his right, title and interest in and to his Trust Shares for the benefit of another person or persons as therein provided.

Except as herein provided, no such transfer shall be binding upon the Company or the Custodian, and until the Custodian and the Company shall have received written notice of any such permitted transfer, the Custodian and the Company may treat the Purchaser as the sole and only person having any interest under the terms of this Plan or in the Trust Shares.

**Taxes**

Section 10. The Custodian shall not be personally liable for any taxes levied or assessed against it with respect to the Trust Shares in its custody hereunder or arising from the income thereof or sale or transfer thereof. The Custodian is authorized to incur any expense (which term shall include auditing expense and counsel fees) deemed by it necessary or proper in connection with any claim or possible claim for taxes. The term "tax liability" as used in this Plan shall include not only all taxes and possible taxes, with the exception of issuance taxes, but also all such expenses which have been incurred or are likely to be incurred in connection therewith. The Custodian may in its discretion from time to time make deductions to pay or set up reserves for tax liability and may, if deemed necessary, sell Trust Shares to provide funds for the payment of tax liability or for reserves therefor, but upon final adjustment of such tax liability, the Custodian shall make the proper adjustment of any reserve with the Purchaser. The Company agrees to pay all original issuance taxes, if any, imposed in connection with this Agreement.

**Terms and  
Conditions of  
Custodianship**

**Section 11.**

A. The Custodian is authorized to commence the Purchaser's payment and distributions with payments and distributions received from others, and to deposit the same in a general deposit account or accounts, in its own banking department or in other banks or trust companies, in its name as Custodian for individual Purchasers under Independence Trust Share Purchase Plan. The Custodian is likewise authorized to commence, any or all Trust Shares purchased for the Purchaser with Trust Shares purchased for others; provided, however, that Custodian shall not commence any certificates representing Trust Shares with its own corporate assets.

B. The Custodian is authorized to cause all certificates representing Trust Shares to be registered in its name as Custodian, or in the name of its nominee or nominees.

C. Custodian shall keep accounts for the Purchaser showing the payment made hereunder, the deductions therefrom, and the proper amount of Trust Shares or fractions thereof held for Purchaser from time to time. The Company and Purchaser shall have the right to inspect said accounts during usual business hours.

D. The Custodian assumes no duties or obligations not specifically imposed upon it by this Plan. Without limiting the generality of the foregoing, the Custodian assumes no responsibility for the choice of the investment, the investment policies of the Trust under which the Trust Shares are issued, or for any act or omission on the part of the Company. The Custodian specifically does not assume the duties of investment ordinarily imposed upon a Trustee and its only obligation shall be to administer its custodianship duties as in this Plan specifically set forth. The Custodian assumes no responsibility for the compliance by the Company with any federal or state law relating to the issuance, registration or qualifications of securities, or for the compliance by the Company with any of the rules, regulations or orders of any commission or commissions constituted under any such law. All recitals contained herein shall be construed as those of the Company and not those of the Custodian.

E. The Custodian shall have no right to terminate its custodianship under this Plan until the same is terminated in accordance with the provisions hereof; provided, however, that any company into which the Custodian may be merged, or with which it may be consolidated, or any company resulting from any reorganization, merger or consolidation to which the Custodian shall be a party, or any company to which the Trust Shares shall be transferred pursuant to an order of any court or by mutual agreement of all of the parties hereto, shall be the successor of the Custodian hereunder and shall be bound by all of the terms hereof without the execution or filing of any paper or any further act on the part of any of the parties hereto.

Section 12. Any notice required to be sent to the Purchaser shall be sufficiently delivered if placed in the United States mail with sufficient postage attached and addressed to the Purchaser at his address as the same is noted upon the records of Custodian. The date of mailing of such notice shall be deemed to be the date of giving of such notice.

**Authentication**

**Miscellaneous**

A. No agent or other person has the authority to alter or change the terms of this Plan or to bind the Company or the Custodian by any statement written or oral not contained herein.

B. Custodian's account and records will be audited each month by a Certified Public Accountant duly licensed by the Commonwealth of Pennsylvania, satisfactory to Custodian.

C. Company, upon the written request of Purchaser, will furnish Purchaser with statements regarding the amount and nature of dividends and distributions for each twelve months' period ending December 31st received by Custodian upon Purchaser's Trust Shares.

D. The provisions of this Plan shall be construed according to, and all rights hereunder shall be governed by, the laws of the Commonwealth of Pennsylvania.

E. Any reference in this Plan to the masculine gender shall include the feminine and neuter gender.

Purchaser shall become a party to this Agreement by accepting delivery hereof.

In Witness Whereof, the Company has caused this Agreement to be duly executed by the facsimile signature of its President this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.  
**Independence Shares Corporation**

By

*Alfred W. Gray*  
President

The undersigned hereby agrees to act as Custodian for the Purchaser upon the terms and conditions set forth in this Agreement.

**The Pennsylvania Company for Insurance  
on Lives and Granting Annuities**

By \_\_\_\_\_

Authorized Signer

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79

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## [fol. 111] IN UNITED STATES DISTRICT COURT

## MOTION FOR DISMISSAL—Filed March 23, 1939

The Pennsylvania Company for Insurances on Lives and Granting Annuities, one of the defendants, moves the Court as follows:

1. To dismiss the action as to it because the complaint fails to state a claim against it upon which relief can be granted.
2. To dismiss the action against it on the ground that the complaint fails to state any grounds upon which the trust assets in its hands should be delivered into the possession of a receiver for Independence Shares Corporation (a Pennsylvania corporation).
3. To dismiss the action against it on the ground that the Court lacks jurisdiction because the amount actually in controversy as between citizens of different states is less than three thousand dollars exclusive of interest and costs.

Saul, Ewing, Remick & Saul. By Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

## [fol. 112] IN UNITED STATES DISTRICT COURT

## MOTION FOR DISMISSAL—Filed March 23, 1939

The defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3rd, move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants above named upon which relief can be granted.
2. To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars, exclusive of interests and costs.
3. To dismiss the action on the ground that the Court lacks jurisdiction for the relief asked, since it appears from

the complaint that none of the complainants is a proper party to ask for the relief herein prayed for.

4. To dismiss the action as to Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal and Joseph Laky on the ground that the Court lacks jurisdiction because there is no diversity of citizenship between the named complainants and the above-named defendants.

(Sgd.) Robert F. Irwin, Jr. (Sgd.) Frank Rogers Donahue, Attorneys for Named Defendants.

[fol. 113] IN UNITED STATES DISTRICT COURT

### **Statement of Evidence**

**Present:**

Harry Shapiro, Esq., representing the plaintiffs.

Robert F. Irwin, Jr., representing Independence Shares Corporation of Pennsylvania, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3rd, defendants.

Saul, Ewing, Remick & Saul, Esqs., by Francis H. Bohlen, Jr., Esq., representing the Pennsylvania Company for Insurances on Lives and Granting Annuities, defendant.

### **Plaintiffs' Evidence**

ALFRED H. GEARY, having been duly sworn, was examined and testified as follows:

**Cross-examination.**

By Mr. Shapiro:

Q. Mr. Geary, you are one of the defendants named in this case as an officer or director of the Independence Shares Corporation?

A. Yes.

Q. Is that correct?

A. Yes.

Q. What is your office?

A. President.

Q. You are president of Independent Shares Corporation?

A. And director, yes.

Q. And director. Mr. Geary, recently there has been a sale of some of the securities held by the Pennsylvania Company as Trustee under an arrangement with your company, the Independence Shares Corporation, is that correct?

A. Yes.

[fol. 114] Q. How many shares of the forty-two were sold?

A. Seven.

Q. That is, seven distinct kinds of shares?

A. Seven distinct issues.

Q. That leaves the portfolio down to thirty-five, is that right?

A. Yes.

Q. How much money was received as a result of that sale?

A. I have not seen the figures yet.

Q. Approximately.

Mr. Irwin: He doesn't know.

Mr. Shapiro: Pardon me, you are not testifying.

By Mr. Shapiro:

Q. Approximately, Mr. Geary.

Mr. Irwin: He said he doesn't know.

The Court: Mr. Irwin, of course, when you say he doesn't know, you can object, but you can't testify for this witness.

Mr. Irwin: I object, sir.

The Court: Mr. Shapiro proceeded to ask him the approximate amount.

Mr. Irwin: If it isn't the exact amount, is there someone here who can give us that?

Mr. Shapiro: I never heard of this kind of procedure before.

The Court: I have already spoken.

Mr. Shapiro: I know your Honor has. I neglected to say that this witness is called as under cross-examination.

By Mr. Shapiro:

Q. I imagine somewhere in the books the amount is recorded, is that right?

[fol. 115] A. The distribution is being audited right now by certified public accountants.

Q. I know you said about the distribution—

Mr. Irwin: I object, sir, to Mr. Shapiro's making remarks and not asking questions.

The Court: I know, but the witness didn't make a responsive answer to the question.

By the Court:

Q. What was the amount received out of the sale of these seven issues? Can you give it to us approximately?

A. \$700,000.

By Mr. Shapiro:

Q. \$700,000. What is the procedure you are now following with the distribution of that money?

A. What is the procedure we are now following?

Q. What is being done by the company with the money? What will be done by it in the course of the next few days?

A. The company has nothing to do with the money. The money is in charge of the Trustee.

Q. Who sold the shares?

A. Members of the New York Stock Exchange.

Q. Who ordered the sale?

A. The Pennsylvania Company.

Q. Who gave them an order to order that sale?

A. Independence Shares Corporation.

Q. Then you, in the first place—your company ordered the sale, didn't you?

A. Yes.

Q. What commission did the company charge for making that sale against the fund?

A. We haven't charged any commission.

Q. What is your charge for making that sale?

A. The distribution is distributed in cash under the deed of trust.

Q. Don't you make a charge against the fund for that sale?

[fol. 116] A. There is a fee for the Trustee.

Q. What is the fee?

A. It is limited, and it is in accordance with the activity of the trust in the preceding six months' period.

Q. You mean the Pennsylvania Company?

A. The Pennsylvania Company, yes.

Q. Isn't it true they get twenty-five cents a share as their only fee?

A. It is not true.

Q. The twenty-five cents is a commission?

A. That has nothing to do with the trust. That is in accordance with the plan. It has nothing to do with the distribution.

Q. Doesn't the Independence Shares Corporation charge a two and a half percent commission on that \$700,000?

A. That was formerly a charge which was returned to the Trustee by way of fees. There will be no two and a half per cent charged on this distribution.

Q. There has been up to this time?

A. That was customary, two and a half per cent of the amount to distribute.

Q. When you made the distribution you sent it to the persons in interest—I don't know what you call them—less than two and a half per cent up until this time, at least, didn't you?

A. That is correct.

Q. And less what other charges?

A. Less no other charges.

Q. You have a right from all of your investors, or from a major portion of them—a right to reinvest, don't you?

A. Yes.

Q. So, there are a number of people who won't get a proportionate share of this distribution, but will leave it there for the purpose of reinvestment, is that correct?

A. That is correct. They have been put on notice to that effect.

[fol. 117] Q. How many of those persons, would you say? What is the proportion of those who leave it for reinvestment as compared to the whole?

A. A fair majority, I would say.

Q. When you say reinvest that, up until this time, at least, you charged a 4 per cent commission for reinvesting—the Independence Shares Corporation—isn't that right?

A. That's correct.

Q. And then you charged a 9 per cent overwrite on that, didn't you, up until this time?

A. If you are talking about 4 per cent, you are talking about the Independence Shares Purchase Plan. When we charge 4 per cent there isn't any other charges.

Q. When you charge 4 per cent there isn't any other charges?

A. No, sir.

Q. There has not been up until this time?

A. No, sir.

Q. That 4 per cent is above the two and a half per cent, isn't it?

A. Yes.

Q. When you charge the 6—what is the 65-cent charge you are now making instead of 9 per cent?

A. That is a deduction in connection with any payments on the purchase plan.

Q. What does that mean?

A. We are engaged at present in the sale of Independence Trust Shares on the Independence Trust Shares Purchase Plan. From each payment there is a six and a half per cent deduction.

Q. By whom?

A. By the Trustee payable to our company.

Q. Then it is eventually a 6½ per cent charge by the Independence Shares Corporation?

A. That is correct.

Q. From each investment?

[fol. 118] A. That is correct.

Q. Won't that happen when you reinvest?

A. Only on initial payments, only on principal payments. It has nothing to do with the distribution.

Q. That is over and above the sixty dollar creation fee, isn't it, that 6½ per cent?

A. Yes.

Q. And that has been substituted for the 9 per cent overwrite which was the original charge?

A. Yes, sir; substituted for the 7½ per cent overwrite.

Q. See if you can follow me. When you reinvest this money for those who gave you the authority to do it, what they get is an Independence trust share, or a multiple of Independence trust shares, isn't that right?

A. That's right.

Q. And when you give them those shares, how do you figure how many they are entitled to get?

A. Depending upon the market price.

Q. No charge at all?

A. A mark-up of  $7\frac{1}{2}$  per cent, as I testified before.

Q. I mean even now, the first transaction is completed, you have issued shares to me, I am one of your investors, you have charged me in that the  $2\frac{1}{2}$  per cent commission, and you have charged me the 9 per cent overwrite, whatever it was—at that time it was 5 per cent. Now, you have got some stocks, you have sold them, and being an investor in Independence Shares Corporation, I am entitled to a dividend.

A. That's right.

Q. Out of the \$700,000?

A. That's right.

Q. Suppose I get the cash, how much charges are deducted and put against my share of the cash?

A. Whatever the Trustee's fees for the prior period were.

Q. What is that?

A. Limited to one cent per trust share semi-annually.

[fol. 119] Q. What does Independence Shares Company get?

A. Nothing.

Q. No deduction from them?

A. No, sir.

Q. Suppose I am an investor.

A. Subject to the retail price for the Independence trust shares, which includes a mark-up of  $7\frac{1}{2}$  per cent.

By the Court:

Q. What about this 4 per cent which you mentioned a moment ago?

A. That is the current deduction, your Honor, in connection with Independence Trust Shares Purchase Plan. In other words, when dividends are reinvested on plans of that type that were sold, there is a deduction of 4 per cent in lieu of the  $7\frac{1}{2}$  per cent.

By Mr. Shapiro:

Q. In other words, if this whole 7—

Mr. Irwin: Let him finish.

By Mr. Shapiro:

Q. I beg your pardon, were you finished?

A. Yes.

Q. This whole \$700,000 were to be reinvested, under your arrangement, then, the first thing that would happen is that you would deduct 4 per cent on that, or \$28,000?

A. No, sir.

Q. How much per cent?

A. No deduction except for the Trustee's fee, which is not figured in percentage. I don't know what the fee will be; the audit has not been completed as yet.

Q. Whose fee?

A. The Pennsylvania Company's fees.

Q. I am talking about Independence Shares Corporation.

A. So am I.

Q. Not Independence Company.

[fol. 120] Mr. Irwin: If your Honor please, this witness already said Independence Shares Corporation got nothing from that sale.

The Court: Go on with the next step. That is correct. Go on with the next step.

By Mr. Shapiro:

Q. When the \$700,000 is invested, what is this 4 per cent charge that you told the Judge is made up against this fund?

A. The 4 per cent charge is the amount that is deducted from that portion of that distribution that is payable to the holders of Independence Trust Shares Purchase Plan.

Q. All right. Will you tell me how that would work out in this \$700,000 sale that you have just now made?

A. I don't know how much is allocated to that particular item.

Q. You said the major portion of it would be for reinvestment?

A. That's right.

Q. The portion that is not for reinvestment you said would be charged with 4 per cent?

A. No, I did not.

Q. I thought you did.

A. I did not. I shouldn't have, if I did..

Q. Well, what is that 4 per cent you talked about? I can't get it clear.

Mr. Bohlen: I think I can clear it up—

Mr. Shapiro: I object, if your Honor please.

The Court: I will sustain the objection. Let the witness answer.

The Witness: Let's have two distinctions here. I think I can make it clear if we do.

[fol. 121] By Mr. Shapiro:

Q. I wish you would. Go ahead.

A. Under the capital savings plan the amount of distribution if reinvested is subject to the regular creation price of trust shares of  $7\frac{1}{2}$  per cent.

Q. What do you mean, "Creation price"? You mean a creation charge of  $7\frac{1}{2}$  per cent?

A. Yes.

Q. And what is that  $7\frac{1}{2}$  per cent? Of what, I mean? Seven and a half per cent of what?

A. Seven and a half per cent of the market price of the unit.

By the Court:

Q. That is a  $7\frac{1}{2}$  per cent mark-up on the price of the security?

A. Yes, it figures 6.8 per cent of the purchase price.

By Mr. Shapiro:

Q. Independence Shares Corporation receives  $7\frac{1}{2}$  per cent of the purchase price?

A. 6.8 per cent.

Q. All right, that is what you eventually get!

A. Yes.

Q. What other mark-up is put in that?

A. No other.

Q. Don't you include the dividends that are accrued but not paid?

A. That is included in the distribution.

Q. That is included in the price, isn't it?

A. It is included in the distribution. The shares sold ex-dividend on February 28th, ex the amount of the proceeds of the sale of the stock, and ex the amount of the dividend currently distributed April 1st.

Q. When you buy stock which is sold with the dividend, and buy stock which entitles you to a dividend to be received later, you include the dividend in the price, don't you?

[fol. 122] A. That's right.

Q. And when you get the dividends you distribute them, don't you?

A. Yes.

Q. When you distribute them what charge do you make against that dividend?

A. There are two different procedures.

Q. I know; you tell us both procedures.

A. I am trying to make it clear. There are two different types of procedures. In one procedure there is a 4 per cent deduction for our company.

Q. You mean Independence Shares Corporation?

A. Period.

Q. What do you mean, 4 per cent of what?

A. Of the amount of the distribution to be reinvested.

Q. What is the next?

A. That is in connection with the Independence Trust Shares Purchase Plan. In connection with the capital savings plan there is a mark-up of  $7\frac{1}{2}$  per cent on the distribution that is used to purchase additional trust shares.

Q. That costs the investor  $11\frac{1}{2}$  per cent, as I total it up, isn't that correct?

(Laughter.)

The Court: Let's have a little order. As I understand it, there are two courses that may be pursued. If one course is pursued there is a 4 per cent charge; if another course is pursued, it is  $7\frac{1}{2}$  per cent. The two are not added together.

The Witness: That is correct.

Mr. Shapiro: There is a great deal of laughter, but the smirk will come off the face. I am over twenty-one years of age. This gentleman is talking about Independence Trust Shares and capital savings, and it is the same thing. What this gentleman means—

Mr. Irwin: If your Honor please, I object to any remarks by Mr. Shapiro.

[fol. 123] The Court: It was brought on by the laughter from counsel table. I can't conceive of a proceeding of this kind being tried in anything but an orderly manner.

I will adjourn for the day if it keeps up. I am not going to sit here and listen to bickering between counsel brought on by—well, the kind of tactics that shouldn't have any place in a courtroom. Address your objections to the Court, Mr. Irwin; and, Mr. Shapiro, you do the same thing.

Mr. Shapiro: Very well, sir.

Mr. Irwin: I have tried to.

By Mr. Shapiro:

Q. What you mean is that the first part of your proceeding is the purchase of these forty-two shares of stock and the second part of it is the issuance of an Independence Shares Corporation stock certificate to the investor; that is what you mean. I mean the first thing that happens in this picture is that certain shares of stock are bought at the suggestion of Independence Shares Corporation, or on its order, and then certificates of Independence Shares Corporation are issued to the investors?

A. No, sir.

Q. Will you tell me what happens?

A. I will. In the first instance, Independence Shares Corporation acts strictly as a depositor.

Q. What do you mean by that?

A. I will explain. With its own funds it purchases the units of stock in the trust, in the Independence trust.

Q. Tell us what—

Mr. Irwin: Let him answer the question.

Mr. Shapiro: I am examining the witness.

Mr. Irwin: May I ask your Honor—

The Court: You should address your objection to the Court.

[fol. 124] Mr. Irwin: I am sorry.

The Court: May I suggest, Senator, that he give his explanation, and then you question him on it?

Mr. Shapiro: I thought he had given it, and I wanted to follow it up.

By Mr. Shapiro:

Q. Suppose you start all over again, it will be better.

A. The Independence Shares Corporation purchases with its own funds the unit of stock or units of stock of the Independence trust. In other words, it buys five shares of

United States Steel, five shares of General Motors, five shares of Allied Chemical, and so on.

Q. That is the basic stock, you mean?

A. The basic stock. Those stocks are then deposited under a trust agreement with the Pennsylvania Company. Against the deposit of each unit of stock the Pennsylvania Company issues one thousand Independence Trust Shares.

Q. To whom?

A. To the purchasers of the plans as their money is paid into the Pennsylvania Company as Trustee and/or custodian.

Q. Does that finish your explanation?

A. Yes, sir.

Q. Will you follow those steps in this way? When the shares are purchased by the Independence Shares Corporation—when I say the shares, I mean the basic stock—when they are purchased, then, of course, a record of the price, the market price of that stock is noted somewhere, it is available.

A. It is kept in our office.

Q. Are there any charges added to that as the cost price before it gets into the hands of your Trustee, the Pennsylvania Company?

A. There are no charges, the brokerage.

Q. The brokerage charge is added?

A. That is correct.

[fol. 125] Q. What else?

A. Whatever we have to pay—whatever brokerage we pay we proportion in the make-up price of trust shares.

Q. When those shares come to the Pennsylvania Company, against them are issued your Independence shares stock to the purchaser—

A. Let's give them the proper terminology; Independence Trust Shares, they are not Independence Shares Corporation stock.

Q. Doesn't the purchaser get the shares of Independence Shares Corporation?

A. No. He has nothing to do with shares of the Independence Shares Corporation.

By the Court:

Q. Who owns the Independence Shares Corporation?

A. Our stockholders.

By Mr. Shapiro:

Q. Who are they?

By the Court:

Q. That is separate and distinct from plan holders?

A. Yes, sir.

By Mr. Shapiro:

Q. Who are they?

Mr. Irwin: I object. I don't see why we should disclose to Mr. Shapiro who our stockholders are. He said he was going to examine along certain lines.

Mr. Shapiro: I am not talking about anything but misrepresentations.

The Court: I can't understand an objection that goes to the identity of the defendant.

Mr. Irwin: The identity of the defendant—

The Court: I suppose the information is available somewhere.

[fol. 126] Mr. Irwin: If your Honor will care to have it, Mr. Geary will present it.

The Witness: I will be glad to present a stockholders' list.

By Mr. Shapiro:

Q. Who are they?

A. I haven't a list with me. We have some fifteen or so stockholders.

Q. Fifteen or what?

A. Fifteen or so.

Q. What is the capital stock of the Independence Shares Corporation? What is the stated capital stock?

Mr. Irwin: If your Honor please, I thought Mr. Shapiro was going to confine his examination—

The Court: Questions are always relevant as to the identity of the defendant. Objection overruled, exception granted.

By Mr. Shapiro:

Q. What is it?

A. Stated value of the stock?

Q. Yes.

A. \$65 a share.

Q. I mean the total.

A. 1058 shares outstanding.

Q. 1058 shares. What is the total amount paid in?

A. \$111,800.

Q. Is that cash paid in?

A. Yes, sir.

Q. Those shares are controlled, you say, among fifteen or seventeen stockholders?

A. That's right.

Q. That was the original amount that was paid in?

A. That is the total amount.

Q. Up to date?

A. Yes.

[fol. 127] Q. Getting back to the Independence Trust Certificate, as you call it, when that—

A. Independence Trust Shares.

Q. Independence Trust Share, when that is finally issued to the investor, he pays for the basic stock what you paid for it, including the brokerage commission—

A. He doesn't pay for it what we pay for it. What we pay for it has nothing to do with it.

Q. You didn't let me finish the question.

A. I want to make that clear.

Q. Suppose we take it your way. You say it has nothing to do with it, what you pay for it; what do you mean by that?

A. If he purchases for trust shares at the market price certain underlying stocks, at the day the Pennsylvania Company makes the purchase for him—

Q. You have already bought it in advance?

A. That makes no difference. We have to assume the risk of carrying it at a profit or a loss.

Q. I don't follow you. I thought you said first you buy the stock.

A. I did; we do.

Q. Then the investor gets the certificate?

A. The investment is being made day by day.

Q. Yes.

A. An investment that is made today is made at a price which is based on the closing price of the stocks in the unit on the day previous. In other words, we may have bought the shares on last Thursday's market. If the shares had gone off between Thursday and today, the investors would

pay today's price regardless of the price that we paid for the shares.

Q. And if it went up the investor would pay today's price, also?

A. That is correct.

Q. What happens to that profit? Who gets that?

A. We get that.

[fol. 128] Q. You get that?

A. Or loss.

Q. I understand.

A. There is a double risk.

Q. Yes, I understand that. That is what I want to know. So that in this transaction all of these shares of stock that are being deposited with the Pennsylvania Company before the investor comes into the picture are subject to a loss or profit by you, the Independence Shares Corporation?

A. That is correct.

Q. That is correct, isn't it? And then when he comes in today to pay, the investor pays its present market plus what other charges do you put on it? What other charges are added to that?

A. There are two sets of charges, which is something we don't seem to be able to make clear.

Q. Now, we are at the point—

Mr. Irwin: Now—

By Mr. Shapiro:

Q. I am putting the question so we don't misunderstand each other. We are now at the point where there is in the possession of the Pennsylvania Company some basic stock, and I am the investor, I am going to participate. You are going to issue a certificate to me, a trust certificate. You sell me that stock, and you issue the trust certificate to me upon the basis of the market of that stock today plus what charges?

A. Plus seven and a half per cent in the case of the Capital Savings Plan. Contract certificates—

Q. Won't you—

A. There are two separate and distinct sets of charges, please.

Q. Won't you take my question?

Mr. Irwin: May I ask that the witness be permitted to answer the question?

[fol. 129] The Court: I think you would save time, Mr. Shapiro, that way.

Mr. Shapiro: I will only have to go back.

The Court: We will go back again.

Mr. Shapiro: He hasn't answered my question. I want to know what does the man pay, what charges are added to a man who buys an Independence Trust Certificate which he talked about. I want to know—

By the Court:

Q. What does a man pay that buys an Independence Trust Share?

Mr. Shapiro: He calls it a certificate.

Mr. Irwin: I think your Honor has the correct terminology and that Mr. Shapiro is confused about that.

The Witness: Independence Trust Shares are sold to the Pennsylvania Company under two separate and distinct plans.

By the Court:

Q. What is plan No. 1?

A. Plan No. 1 is the Capital Savings Plan.

Q. What is the other plan?

A. Contract certificate. Plan No. 2 is Independence Trust Shares Purchase Plan.

By Mr. Shapiro:

Q. What is the difference between the two?

A. One is a custodianship agreement; one is a trust contract certificate.

Q. What does that mean? What does "custodianship agreement" mean?

A. The custodianship agreement is a more simple plan. It isn't such a cumbersome contract. The entire agreement is on the certificate, including the imposition of certain responsibilities on the Pennsylvania Company as custodian, as it does on the Pennsylvania Company as Trustee.

Q. What is the other plan?

A. Capital Savings Plan.

Q. What does that mean? What is the difference between that and the other one?

A. That establishes a trust relationship with the bank in connection with the investing of the periodic payments and the holding of the trust shares.

Q. Whatever it is—

The Court: May I say one thing to you? I have a luncheon engagement at quarter of one.

Mr. Shapiro: I will be through before that.

By Mr. Shapiro:

Q. My question is what under those two plans is charged against the stock in the instances I talked about?

A. I will be glad to explain it.

Q. In addition to the actual market value.

Mr. Irwin: If your Honor please, may I ask Mr. Shapiro to indicate the instances that he refers to?

The Court: At the very inception.

Mr. Shapiro: If this gentleman doesn't understand my question—

By the Court:

Q. Assuming that one subscribes to the capital plan, we will call it, what happens then?

A. His payments after deductions for the Pennsylvania Company fees and for our \$60 service fee are then used to purchase Independence Trust Shares at a mark-up of 7½ per cent.

Q. And in the case of the other, the Independence Trust Shares Plan.

A. There is no mark-up on the trust shares; a deduction of 6½ per cent from his payment, unless his payments —well, I won't qualify it.

[fol. 131] By Mr. Shapiro:

Q. What do you mean there is a deduction?

The Court: He wants to qualify it.

The Witness: I don't want to qualify it.

By Mr. Shapiro:

Q. What do you mean, there is a deduction of 6½ per cent?

A. Just that.

Q. I want to get the procedure. You mean when he pays you \$10 you take off sixty-five cents?

A. That is correct.

Q. That leaves him sixty-five cents less to invest?

A. That is correct.

Q. It amounts to the same thing as 6½ per cent?

A. That's right.

Q. Are there any other charges in addition to that at that particular time?

A. Not on principal payments, no.

Q. What other payments?

A. There are different fees. It is all explained in our prospectus.

Q. I am not asking you about your prospectus. I would like you to answer the question: Up until that point there are no further charges, are there?

Mr. Irwin: I object to that remark of Mr. Shapiro's.

The Court: I will sustain your objection.

Mr. Shapiro: I want this witness to understand my question.

By Mr. Shapiro:

Q. I am not talking about what you have in your prospectus; I am talking about what you do. The second question I am asking you is after that phase when is the next charge? [fol. 132] A. There isn't any charge.

Q. You said not on principal payments. What do you mean by that? Let's put it this way: You have had both kinds of those transactions.

A. Yes.

Q. You have investors of both types?

A. Yes.

Q. You have one figure of \$700,000, approximately, which represents basic stock in both types of investments, you have told me.

A. That's right.

Q. In making distribution to those people of both types when you do it by cash, what are the charges made against those people, against their share of that \$700,000?

A. The only charge is for the administration of the trust imposed by the Pennsylvania Company.

Q. And no charge for distribution to them as a dividend of this money?

A. No, sir.

Q. Did you do that before? Was there an occasion before today when you made that charge?

A. The charge has been changed; there was a charge of 2½ per cent to the Pennsylvania Company.

Q. When was that change made?

A. The change was made effective sometime in December of this year.

Q. December of this year?

A. Of last year, I mean.

Q. By resolution of the board of directors?

A. By a supplemental trust agreement executed between the bank and ourselves.

Q. It was some time in December of last year?

A. Yes.

Q. What charge did you substitute for that 2½ per cent charge?

A. An indefinite charge; it is limited only as to a maximum.

Q. What do you mean by that?

[fol. 133] A. There is a maximum limit on it.

Q. What is the maximum?

A. One cent per share semi-annually.

Q. Who gets that one cent?

A. The Pennsylvania Company.

Q. Don't you get any of it?

A. No.

Q. The 2½ per cent went to you?

A. And was paid back to the Pennsylvania Company for administrating the trust. The procedure was to indorse the check over to the bank the minute we got it.

Q. When you reinvest for any of these who—by the way, do you have authority to invest in both types of cases, or only in one?

A. We have authority to invest as it was originally given to us in the first place.

Q. That is what I mean. Do you get authority to invest in both types?

A. It depends on what authority is given to us at the time of the purchase.

Q. Then you have some cases in which you have authority to reinvest for both types of plans?

A. That is right.

Q. When you reinvest this \$700,000 for those people for whom you have authority to reinvest, what will the charge be?

A. The charge will be in the case of the Capital Savings Plan a mark-up in the shares of  $7\frac{1}{2}$  per cent.

By the Court:

Q. In other words, you go through the same steps as you did originally?

A. In the case of the Independence Trust Shares Purchase Plan, there will be a deduction of 4 per cent allocated to that particular one.

Q. In the case of Exhibit C-15, it calls for nineteen shares of Independence Trust Shares to Albert A. Masciangelo, [fol. 134] In estimating the amount that was charged to this gentleman for that certificate you said the other day, I think—if I am wrong, you correct me—there was included the market value of the basic stock at the time of the purchase by him plus certain other charges one of which I think you said was the broker's commission?

A. Brokerage commission and taxes.

Q. Brokerage commission and taxes?

A. That is right.

Q. And accumulated dividends if they had been declared but not paid?

A. That is right.

Q. What brokerage commission did you charge?

A. Regular stock exchange commission.

Q. Did the Capital Savings Plan, Inc., or the Independence Shares Corporation have a broker's license?

A. We have an investment dealer's license, yes.

Q. Did you have a broker's license which would authorize you to carry this transaction out on the stock exchange?

A. No.

Q. So, you had to use another broker to do that?

A. We purchased it through regular members of the New York Stock Exchange.

Q. Always?

A. Always.

Q. And you always paid the regular brokerage commission?

A. Yes.

Mr. Irwin: Are you referring to the underlying securities of Independence Trust Shares?

Mr. Shapiro: He knows what I am referring to; if he doesn't know I would like him to tell me.

The Court: Let's not argue.

Mr. Shapiro: I am saying if he doesn't know I would like him to tell me. I don't want to be interrupted. This is awfully difficult to follow, these names.

[fol. 135] The Court: I am sure Mr. Geary if he isn't clear on the question asked by Mr. Shapiro, will so state.

By Mr. Shapiro:

Q. Who was Clifford Keef?

A. He was a former employee of Independence Shares Corporation.

Q. That doesn't give me much information about him. Can you give me some more?

A. Clifford Keef executed the orders for the purchase of underlying stocks when we needed them.

Q. How did he execute those orders?

A. Gave the orders.

Q. He gave the orders? I don't understand what his duties were; will you tell me what they were?

A. He was, among other things, the order clerk who placed the orders for the stocks if we needed them with brokers who were members of the New York Stock Exchange.

Q. Was he a broker?

A. No, he was not. By a broker I take it you mean a member of the New York Stock Exchange?

Q. Was he the man who would have the right to sell this stock on the Exchange?

A. He was the man that had the right to place the orders for our company.

Q. On the Exchange?

A. No, with a member of the New York Stock Exchange.

Q. Let us see if I understand it. You say that whenever you charged a brokerage commission, the regular brokerage commission in ascertaining the price of this or other similar trust shares, Independence Trust Shares, you charged the regular brokerage commission?

A. Regular brokerage commission that was set up by the New York Stock Exchange.

Q. Did you always pay a regular broker's commission in each one of these transactions?

[fol. 136] A. Yes.

Q. You never bought these shares through Mr. Keef and paid him a salary to do that work for you?

A. Mr. Keef was paid a salary as order clerk, not as general trader to conduct a general trading business in investment trust shares, or other types, including Independence.

Q. Isn't it a fact, or is it a fact, that in many of these transactions the only thing you paid to consummate the transaction was the salary you paid to Mr. Keef?

A. I don't follow that question at all.

Q. You don't?

A. No.

Q. What I am trying to find out—

Mr. Irwin: Let him repeat it.

Mr. Shapiro: May I proceed, sir?

The Court: Yes.

By Mr. Shapiro:

Q. What I am trying to find out very plainly is—

Mr. Irwin: The witness asked to have the question repeated.

The Court: Mr. Shapiro is trying to explain what he means.

By Mr. Shapiro:

Q. What I am trying to find out is whether or not you actually didn't pay brokerage commissions in many cases and charged them without having paid them?

A. That is not so.

Q. It is not so?

A. No.

Q. Last week you said to me the amount of paid in capital stock of this corporation, Independence Shares Corporation, was \$111,800.

The Court: \$111,800.

[fol. 137] The Witness: \$111,800.

By Mr. Shapiro:

Q. Did you understand my question?

A. Yes, sir; I did.

Q. My question was how much did the stockholders pay in for their stock?

A. That is exactly it.

Q. And you said \$111,000?

A. \$111,800, that is it.

Q. I have before me a prospectus of Independence Trust Shares for June 14, 1938—I imagine somebody can present you with a copy of this—

Mr. Irwin: Here it is.

(A paper was produced and shown to the witness.)

By Mr. Shapiro:

Q. Will you look at page 27? Proceed from the back so you won't get confused about certain double numbers. Have you page 27 headed "Independence Shares Corporation, registrant"?

A. Yes, sir.

Q. Look at the right-hand corner under capital: Capital stock, par value, \$100 per share, authorized and issued, 50 shares, \$5000?

A. That's right.

Q. Capital surplus \$8601.44; earned surplus, note C, \$15,590.39; total capital, \$29,191.83. How do you explain that statement with yours that there was \$111,000 paid into the capital stock?

A. I was speaking of the Independence Shares Corporation as it now exists, which represents a merger of the Savings Plan, Inc., and the Independence Shares Corporation; all of whose capital Capital Savings Plan formerly owned, and by Independence Shares Corporation I was referring to the survivor of the merger of the two companies.

Q. The question I put to you was how much money was paid by the stockholders for the capital stock, and you told [fol. 138] me \$111,000. I asked you in cash, and you said yes, in cash. How do you explain that?

A. I thought you were referring to the merger, the survivor of the merger.

Q. My question to you was —

A. Well, my answer answered the question.

Mr. Irwin: May I object? Mr. Shapiro asked how much was paid for the stock of Independence Shares Corporation.

Independence Shares Corporation today represents a merger between Independence Shares Corporation—

Mr. Shapiro: I object to this statement. This witness has already told me what they were.

The Court: Mr. Geary is capable of explaining it.

Mr. Irwin: I think it is unfair for Mr. Shapiro to try to make it appear that the witness told him something that was not true.

Mr. Shapiro: I am basing those remarks on the record and ask your Honor to permit the question.

The Court: Mr. Geary attempted to answer it when he was interrupted. Proceed, Mr. Geary.

The Witness: The Independence Shares Corporation now is the survivor of a merger of the Capital Savings Plan, Inc., and Independence Shares Corporation. Prior to the merger, Capital Savings Plan, Inc., owned all of the capital stock of the Independence Shares Corporation. So, when I said that \$111,800, had been the amount paid in to the capital of the Independence Shares Corporation I was referring to the survivor of the merger of the two corporations.

By Mr. Shapiro:

Q. Then it was not paid in cash, the \$111,000?

A. I didn't say that.

Q. Didn't you say that?

[fol. 139] Mr. Irwin: Wait a minute. Be fair to the witness.

The Court: That is a proper question.

Mr. Shapiro: Your Honor, I am not paying any attention to those remarks.

The Witness: I testified it was paid in, in cash.

By Mr. Shapiro:

Q. When you said, "I didn't say that," you mean you don't say that now? I asked you whether it was all paid in in cash or not.

A. I say yes.

Q. How did the merger have anything to do with it? If the two of them merged, it wasn't paid in in cash, was it? If the one company took over the assets of the other, it wasn't a cash payment of \$111,000, was it?

A. Capital Savings Plan—

Mr. Irwin: If your Honor please, I submit this is unfair.

The Court: If Mr. Geary can't answer it because he thinks it is ambiguous in its terms, he will so state.

By Mr. Shapiro:

Q. Mr. Geary, let me read your testimony of last week, if you please—

A. I have read it.

The Court: He has repeated it. There is no inconsistency in his statement. He repeated it again today. He said, "I said last week there was \$111,800 paid in cash, I say so today."

By Mr. Shapiro:

Q. Do you?

A. Yes.

Q. You say \$111,000 was paid in cash?

A. Yes.

[fol. 140] The Court: I really must say to counsel I don't think that counsel has been listening to the witness. He so stated.

Mr. Shapiro: Mr. Irwin has been jumping up so that I didn't hear it.

By Mr. Shapiro:

Q. When was the \$111,000 paid in, in cash?

A. It was paid in originally to the Capital Savings Plan, treasurer of the Capital Savings Plan, Inc.

Q. By each of the stockholders?

A. Yes.

Q. After that there was a consolidation of the assets of the Capital Savings Plan with the Independence Shares Corporation?

A. The steps were these, maybe this will clear it up: Capital Savings Plan, Inc., purchased with its own money Independence Shares Corporation, it purchased all of the outstanding capital stock of the Independence Sales Corporation. On December 31, 1938, the two corporations merged, the latter name retained, so that when I speak of Independence Shares Corporation as having that paid

in capital of \$111,800, I am referring to the Capital Savings Plan which is now known as Independence Shares Corporation.

Q. According to this report the value of the capital stock as of February 28, 1938, although \$111,000 was paid in, is only \$29,191, is that right?

A. That is not right.

Mr. Irwin: I object to that.

The Court: I will overrule your objection.

Mr. Irwin: For he is reading from Independence Shares Corporation.

Mr. Shapiro: That's right.

The Court: Mr. Geary can or cannot answer it. He may state it.

[fol. 141] Mr. Irwin: If your Honor please, if Mr. Shapiro—

The Court: I will overrule the objection.

Mr. Irwin: If Mr. Shapiro—

The Court: Mr. Irwin, I take it for granted he is reading from the statement of February 28, 1938.

Mr. Shapiro: Nobody said anything different. If Mr. Irwin wouldn't be in a hurry to accuse other people, and mind his own affairs; we would get somewhere. He has a right to object without making accusations against me.

The Court: Gentlemen, if you want this matter disposed of, we will do so if we can proceed in an orderly fashion; if we can't, I will continue the hearing for a week.

Mr. Shapiro: I am trying to avoid answering these unwarranted statements that have been made. I am entitled to the protection of the Court from counsel making the statements.

The Court: I have ruled on each occasion, Mr. Shapiro, so that the matter may be one of record. I say to you again, Mr. Irwin, and I say to you, Mr. Geary, if at any time you don't clearly understand Mr. Shapiro's questions, you so state.

The Witness: Yes.

By Mr. Shapiro:

Q. Mr. Geary, so there will be no misunderstanding, I am trying to find out if on February 28, 1938, Independence Shares Corporation stock had a value of \$21,191 according to a copy of the statement that you have before you, where

would the difference between that and the \$111,000 that you said was paid in come from?

A. At the date of this statement Independence Shares Corporation was wholly owned by Capital Savings Plan, [fol. 142] Inc. On December 31, 1938, the two companies merged and the latter name retained.

Q. Will you tell me was the Capital Savings Plan, Inc., in existence at that time?

A. Yes.

Q. What was the amount of stock paid in, into the Capital Savings Plan, Inc.?

A. \$111,800.

Q. \$111,800?

A. That is correct.

By the Court:

Q. May I ask a question? Was the sum of \$21,000 the capital of Independence Shares Corporation, the wholly owned subsidiary of the Capital Savings Plan?

A. Yes.

Q. In other words, you are dividing it in this way: the \$111,000 was divided into \$90,000 and \$20,000, the \$20,000 belonging to the wholly owned subsidiary and the \$90,000 belonging to the former company?

A. Yes.

By Mr. Shapiro:

Q. You mean \$111,000 represents the amount the stockholders paid in for shares of both Capital Savings, Inc., and Independence Shares Corporation?

A. It represented the amount the stockholders paid for shares of Capital Savings Plan, Inc., which was later exchanged, share for share, for shares of Independence Shares Corporation, which was the survivor of the merger.

Q. Then, in February, 1938, both companies were in existence?

A. Yes, sir.

Q. And \$111,000 represents the amount invested by the stockholders in both companies, not \$111,000 in one and \$21,000 in the other?

A. They only invested in one company.

The Court: Don't you see, Mr. Shapiro, Independence [fol. 143] Shares Corporation being a wholly owned subsid-

iary of Capital Savings Plan, there could be no other stockholders?

Mr. Shapiro: I understand. I used the word the other way, it is the investment.

By the Court:

Q. Is that so, as I stated?

A. Yes, sir.

By Mr. Shapiro:

Q. It is the investment of all the stockholders in both companies?

A. Only in the one company.

The Court: It is a question of terminology.

The Witness: The company, itself, made an investment in Independence Shares Corporation.

By Mr. Shapiro:

Q. That is correct, and the assets represented the interest they had in both companies?

A. That is right.

Q. Were the stockholders the same in both companies?

A. No.

The Court: If it was a wholly owned subsidiary—

Mr. Shapiro: I don't mean the stockholders, I mean officers.

The Witness: Substantially the same.

By Mr. Shapiro:

Q. What difference was there, if any?

A. I don't recall.

Q. Under what written authority did you make the substitution of securities, or, rather, make the sale of securities recently that we spoke about last week?

A. Under the authority of the trust indenture creating the trust.

[fol. 144] Q. Have you a copy of it?

A. I think so.

Q. Is it in any of the papers that I showed you this morning? For instance, is it C-14?

A. No, that is not it.

Q. What do you mean, that is not it? You haven't looked at it?

A. I know what that is.

Q. You do know what that is?

Mr. Irwin: Mr. Shapiro, we will try to find out for you.

By the Court:

Q. May I ask a question at this point? Are there two plans in operation now? Do you have two methods of savings or just one?

A. Only one type being sold, but two types being serviced.

Q. There was one discontinued?

A. That's right.

By Mr. Shapiro:

Q. What I am trying to find out is where did you get the authority from?

A. The agreement.

Q. With whom? Who were the parties to the agreement?

A. Independence Shares Corporation and The Pennsylvania Company were parties to the agreement.

Q. Nobody else?

A. Those people who purchased Independence Trust Shares.

Q. They had something to say about it?

A. No.

Q. They did not?

A. No.

Q. You mean without any authority from the investors?

[fol. 145] A. That was a right that was vested in the depositor corporation.

Q. Where is that shown, that you had that right vested in the corporation?

A. It is right in the agreement of trust.

Q. I am not talking about this agreement of trust with the Pennsylvania Company. What papers have you got from the investors that gives you the right to do that? That is what I am interested in.

A. To eliminate shares?

Q. Yes.

A. Don't need any; it is right in this original indenture.

Q. That is the indenture between the Pennsylvania Company and Capital Savings and Independence Shares Corporation?

A. No, it is in the indenture between Capital Savings Plan and Independent Shares Trust, and always has been.

Q. That is what you said.

A. That is what you asked me.

Q. I am asking you where the authority—

A. I get it right in this trust agreement.

Q. Pardon me, what agreement have you with the investor authorizing you?

A. To sell him Independent Trust Shares?

Q. You don't listen to my question.

Mr. Irwin: If your Honor please, I object to that characterization of Mr. Geary's testimony by Mr. Shapiro.

The Court: It wasn't a characterization. I am sure Mr. Shapiro meant no reflection.

Mr. Shapiro: I didn't reflect on him. I said he didn't listen to my question.

The Court: You might have proceeded in another way, Mr. Shapiro.

[fol. 146] By Mr. Shapiro:

Q. What writing have you with the investor that gives you the authority to substitute or to sell some of his stock, the basic stock?

A. I haven't any authority in writing. It is contained in the original declaration, the agreement of the declaration of trust.

Q. What is the date of that original declaration of trust?

A. The second day of April, 1930.

Q. The second day of April, 1930?

A. Correct.

Q. After you sold to investors, how would they know about that particular agreement?

Mr. Irwin: If your Honor please, I think that is a question that covers the whole world; I mean how they do know.

The Court: I will overrule your objection and grant you an exception.

By Mr. Shapiro:

Q. How do they know about that?

A. They know about it, it is contained in the Independence Trust Shares certificate.

Q. In the Independence Trust Shares certificate. I show you a paper which has been offered in evidence and is marked Exhibit 15 now. It is entitled Independence Trust Shares certificate. Is that the first time he knows about it, when he gets that certificate?

A. It is in the —

Mr. Irwin: If your Honor please, I think that the witness should have an opportunity to answer the question before Mr. Shapiro asks him another question.

The Court: You asked him two questions.

Mr. Shapiro: No, I haven't.

[fol. 147] The Court: You asked him first, is that the certificate which is issued, and then is that the first time he knows about it.

Mr. Shapiro: He already said that.

By Mr. Shapiro:

Q. Is that the certificate?

A. That is the certificate.

Q. Is that the first time he knows it?

A. It is in the plan agreement that he gets.

The Court: I think if you had asked the question is there anything said to the prospective planholder, or whatever you call him, of the existence of this provision in the trust indenture before he receives the certificate, after he becomes a member —

Mr. Shapiro: That is where I don't agree with your Honor. These people know exactly what I am driving at, they have slept with this.

By the Court:

Q. I would like to know specifically was anything said to these prospective purchasers before they actually became purchasers to the effect that the Independence Shares Corporation had this right of elimination. That is a very definite part of the whole plan. Can you answer that? Did your sales force tell them?

A. Yes, sir, instructed to tell them.

By Mr. Shapiro:

Q. Any written instructions on it? Any written information about it?

A. I think so, probably.

Q. You don't know?

A. I can't recall all the instructions. We are sending out instructions all the time.

Q. Who made up this printed matter I have offered here? Who made up this printed matter that I have offered in [fol. 148] evidence? Is it gotten up under your supervision? You are the executive officer, I understand?

A. Yes, I am.

Q. Don't you know what the certificates and papers show?

A. Yes, I know.

Q. You know. Do these prospectuses, or any of them, show you have that trust agreement and those rights under the trust agreement?

A. Oh, yes.

Q. Which one? Show it to me.

The Court: Won't you refer to them by number?

Mr. Shapiro: Yes, as soon as he picks them out.

The Court: I don't think there was any reference to this other agreement.

Mr. Shapiro: I didn't offer it, I haven't identified it. It is not one of my papers.

The Court: I am speaking of this agreement of April 2, 1930.

Mr. Shapiro: Yes, I will come to that.

Mr. Irwin: One of the exhibits—

Mr. Shapiro: I wish Mr. Irwin would allow the witness to find his own papers and do his own testifying. I don't want to be shown any papers unless I ask for them, if your Honor pleases. I want this witness to answer the question without help from counsel.

Mr. Irwin: If your Honor please—

Mr. Shapiro: You might as well tell the witness the answer.

The Court: This witness was called for cross-examination, Mr. Irwin.

[fol. 149] Mr. Irwin: I understand, but Mr. Shapiro hands him seventeen exhibits and says, "Look through there and find out."

Mr. Shapiro: I haven't done that, your Honor. I asked him to pick it out from my papers or anywhere else.

Mr. Irwin: I shall pick it out of your exhibits.

Mr. Shapiro: I don't want you to pick it out; I want the witness to pick it out.

The Witness: Page 5—

Mr. Irwin: Don't you want to get the facts?

Mr. Shapiro: May I address your Honor, and not Mr. Irwin? I don't want to pay any attention to his remarks. Every time I say something he uses it as an excuse to do something highly improper. I have practiced law too long to get worked up over nonsense.

By Mr. Shapiro:

Q. You are reading from page 5, Mr. Geary, of what?

A. I don't see what.

Q. You have apparently turned the page, Mr. Geary. I know which one it is, the first page is loose. Exhibit C-8.

A. Exhibit C-8, page 5.

Q. What is that paper?

A. It is Independence Trust Shares' prospectus.

Q. Don't take that first page away, I am going to ask you about it. What is the date of it?

A. January 3, 1939.

Q. That isn't the first time that any of your prospectuses called attention to that, is it?

A. No.

Q. I want to see it earlier.

A. You said find it in any one.

Q. Yes.

A. Which one would you like to see it in?

[fol. 150] Q. Any earlier ones?

A. Yes.

Q. Give me the first prospectus in which you advertised that?

Mr. Irwin: Take your time, Mr. Geary, and look through the whole thing.

The Witness: This is a prospectus of April, 1935. It appears on page 8.

By Mr. Shapiro:

Q. May I see that, please?

A. Certainly.

The Court: Will you give us the exhibit number on that?

Mr. Shapiro: Exhibit No. C-2, page 8, under the heading elimination.

The Witness: Yes.

By Mr. Shapiro:

Q. Will you read that to the Court, please?

A. Certainly.

Q. The portion which you say refers to and gives you the rights contained in the trust agreement of 1930 that you just called to my attention this morning.

A. "Elimination of any stock whose further retention would be inadvisable,—" that is the shares—

"In the course of years, changes may be likely to occur in particular companies or industries represented in our portfolio that would make retention of the investment in some of the present companies unwise. With this in mind, the Trust Agreement provides that, should the Depositor"—which is the Independence Shares Corporation—"conclude that the stock of any company in the portfolio may or will become substantially impaired in value, the Depositor may instruct the Trustee to sell such stock. It is not necessary to await the occurrence of some specific event [fol. 151] before eliminating an impaired stock, nor does the occurrence of any specific event compel elimination when retention of the stock may be advisable. The proceeds of the sale of an eliminated stock are distributed to shareholders at the next semi-annual distribution date. No substitution is permitted. The portfolio is sufficiently large so that even if half the companies should be eliminated, to take an extreme example, a sound diversification would remain."

Q. May I have that agreement of 1930 that you referred to this morning?

(Papers were produced.)

By Mr. Shapiro:

Q. I show you a paper which I will ask the stenographer to mark for identification Exhibit 30—

(A booklet entitled "Agreement and declaration of trust, Independence Shares Corporation and the Pennsylvania Company for Insurances on Lives and Granting Annuities, and other agreements affecting Independence Trust Shares," was marked Plaintiffs' Exhibit 30 for Identification.)

By Mr. Shapiro:

Q. I show you paper marked for identification Exhibit 30 and ask you whether that is the paper you referred to a short time ago as the trust agreement with the Pennsylvania Company?

A. That's right.

Q. Will you look at the front of that? It is marked in lead pencil, although it says Independence Shares Corporation, it says, "of Delaware." Was that Independence Shares Corporation of Delaware?

A. Yes.

Q. That company has been out of existence since 1935, hasn't it? Did you make a new trust agreement?

[fol. 152] A. We assigned all the rights under the trust agreement in the Independence Shares Corporation.

Q. Did you make a new trust agreement?

A. No, sir.

Q. Mr. Irwin has handed me a paper dated the 16th of December, 1938; at least, it is a typewritten copy of some agreement with names, your name as a party to it.

A. It is a third supplemental agreement.

Q. A third supplemental agreement?

A. It has not been printed and bound in this yet.

Q. Where are the other two?

A. They are in here (indicating).

Q. This is a bound copy, Exhibit 30 is a printed copy of the first, second, and third agreements?

A. Here is the third agreement (indicating).

Q. Well, the first agreement, and then a supplemental agreement, and then a second supplemental agreement, and then a third supplemental agreement, is that right?

A. That is right.

Q. And the third supplemental agreement is that typewritten paper which we will ask be marked Exhibit 31 for Identification.

(Third supplemental agreement dated the 16th day of December, 1938, between Independence Shares Corporation and the Pennsylvania Company was marked Plaintiffs' Exhibit 31 for Identification.)

By Mr. Shapiro:

Q. Is that the agreement that was drawn on the 16th of December, 1938?

A. Yes.

Q. I suppose you notified the investors about the supplemental agreement?

A. Yes.

Q. Have you got a copy of the printed notice you sent them?

A. I don't know whether it is here or not.

[fol. 153] Q. Can it be produced? How did you notify them? By printed notice, or what? I am talking about this very supplemental agreement.

A. It was embodied in our new prospectus that was mailed out.

Q. After it was done?

A. Yes.

Q. I am talking about before you did it.

A. No.

Q. You didn't notify them?

A. No.

Q. What were the supplemental changes which were made?

A. Briefly, the supplemental changes were the extension of the termination date of the trust from 1950 to 1970.

Q. A termination of the trust with the Pennsylvania Company in 1970; what else?

A. The change in the method of compensating the Trustee's fees for this six months' period.

Q. What was that change?

A. The change, we covered that on Monday, if I have to go over it again.

Q. As long as you say you have covered it, I will look it up in the testimony. What other change?

A. The change waiving our right to receive interest on the distribution account from the Trustee, which was previously—

Q. You mean commission?

A. Interest.

Q. Oh, interest; the trustee paid interest on the account?

A. That is right.

Q. And who got it? Whose right was waived? Who got the money, the interest?

A. There was no right to receive interest.

Q. Who received it?

A. Trust shareholders in their distribution.

[fol. 154] Q. The investors?

A. Yes.

Q. I mean plainly the Independence Shares Trust, that corporation didn't receive it, did it?

A. No.

Q. Or didn't keep it, anyway; what other things?

A. They are the principal changes.

Q. How about this 9 per cent overwrite? Was that changed in any way?

A. No.

Q. When was that change to 6½ per cent made?

A. It was never made.

Q. I understood originally you charged a 9 per cent overwrite?

A. That is correct, in connection with Capital Savings Plan certificates. We also covered that, I thought.

Q. What you meant last week was that up until the time as long as you were selling Capital Savings certificates there was that overwrite charge of 9 per cent?

A. Up until May 2d, 1938.

Q. And then you stopped selling Capital Savings Plan certificates and sold what?

A. Independence Trust Shares Purchase Plans. It is entirely different.

Q. You mean in that case you don't charge the 9 per cent, but you charge sixty-five cents a month?

A. That is correct. We also made a reduction in the overwrite from 9 per cent to 7½ per cent as of May 2, 1938.

Q. Isn't it correct that was because, first, what you did under Capital Savings Plan was you had a sponsor in the proposition; who was the sponsor?

A. Capital Savings Plan, Inc.

Q. And they sponsored an issue of what?

A. Capital Savings Plan contract certificates.

Q. From whom?

A. From whom?

[fol. 155] Q. Yes, weren't there two companies which got this 9 per cent?

A. That is right.

Q. Who was the other company?

A. Independence Shares Corporation.

Q. So, what happened was that Capital Savings Plan sponsored the Independence Shares Corporation preposition, and when the 9 per cent overhead was paid, 7½ per cent went to Capital Savings Plan and 1½ per cent to the other Independence Shares Corporation?

A. I will only admit the allocation of the 9 per cent was prior to May 2, 1938; 1½ per cent to Independence Shares Corporation and 7½ per cent to Capital Savings Plan, Inc.

Q. Will you tell me why the Independence Shares got 1½ per cent and why Capital Savings Plan got 7½ per cent? And then we will get the answer that way.

A. One and one-half per cent was calculated to cover the cost of operating the Independence Shares Corporation on a most economical basis possible.

Q. Independence Shares Corporation?

A. Yes.

Q. Why did you have to operate that? What were they needed for in this practice?

A. They were needed to create the trust shares.

Q. You are creating the same trust shares now, aren't you?

A. Yes.

Q. Without the two corporations?

A. That is right.

Q. Why did you need them before?

A. Because Capital Savings Plan didn't have a right to create them under the trust agreement.

Q. Under what trust agreement?

A. Under the last exhibit here.

Q. This agreement between you and the Pennsylvania Company?

[fol. 156] A. Yes.

Q. What was to stop them from giving the right? You are doing it now, aren't you? What I want to know is why you should give these people 1½ per cent for doing nothing, that is what I want to know.

Mr. Irwin: I object to that question as being highly improper.

Mr. Shapiro: I believe the question is proper, and repeat it.

The Court: I think the question is all right.

By Mr. Shapiro:

Q. Why did you charge 1½ per cent when you say it was for nothing? It has a consideration.

Mr. Irwin: He hasn't said it was for nothing.

The Witness: There is a cost of doing business.

By Mr. Shapiro:

Q. What I want to know is why you needed it to do this business under this arrangement? Why did the Independence Shares Corporation have to be injected in this picture at all?

A. The Independence Shares Corporation was the basic picture to begin with.

Q. Why did you need the Capital Savings Plan, Inc.? So my question is perfectly clear—

Mr. Irwin: May I ask Mr. Shapiro to give the witness an opportunity to answer the question?

The Court: I would just hate to be on the witness stand with the two of you.

By Mr. Shapiro:

Q. I want you to understand what I am driving at. Tell the Court what was the purpose, why you needed that sec-[fol. 157] ond company? You explain those functions, if you will, of the two companies; that will probably help us.

A. I think it would help a lot.

Q. Go ahead, explain it.

A. Independence Trust Shares is an investment trust of the semi-fixed type. It was in existence prior to the formation of Capital Savings Plan. It was sold and distributed through dealers, E. H. Rollins and Jones, Janney and Company, and others. It was distributed all over the United States, California, New York, out through the middle west, Pennsylvania and the Eastern Seaboard.

Capital Holdings Plan was formed in order to give investors the opportunity to buy Independence Trust Shares on a monthly basis and have those shares held for them by a bank, for the bank to reinvest the semi-annual dis-

tribution, and as the investor made payments the investor's account was credited with Independence Trust Shares which through the machinery of the Trustee was carried out to the fifth decimal point, which meant that all funds for investment were fully invested.

When you are dealing in a two dollar—as a matter of fact, in the early days the price was a good deal higher—when you are dealing with a higher priced stock, let us take the price of \$4, to buy with a \$10 payment other than two shares was not possible. Under this plan, that was gotten out with the Pennsylvania Company it was possible to have that money fully invested after, of course, the allocation for the payments and fees that were called for.

Those plans called for payments of \$1200 over a period of ten years, and they also gave the investor the right to withdraw his trust shares at any time during the length of the plan, or he could terminate the plan whenever he wanted. It was his property, not ours. We merely built up and offered him a convenient method of acquiring these shares over a period of years.

Q. You haven't yet answered my question, Mr. Geary. What was the difference between the functions of the two companies?

[fol. 158] A. Two of them.

The Court: I think he did.

The Witness: The Court understands.

The Court: In other words, the Capital Savings Plan was to enable the persons to participate in the plan or contract of the Independence Trust Shares when they were subscribing on the monthly basis.

Mr. Shapiro: If that is what he said, I am willing to accept it, if your Honor so understands.

By Mr. Shapiro:

Q. Who charged the 7½ per cent?

A. Who got the 7½ per cent?

Q. Which company got the 7½ per cent?

A. Capital Savings Plan, Inc.

Q. And they are the ones that made possible this other plan by sponsoring it, is that what you mean? The Capital Savings Plan is the one that sponsored the sale of the Independence Trust Shares?

A. Sponsored the sales of Capital Savings Plan contract certificates.

Q. Those contract certificates gave them the right to acquire Independence Trust Shares, is that right?

A. Let me put it this way, maybe this will clear your mind on the subject:

Prior to our purchase of the Independence Shares Corporation a dealer commission of 6 per cent was given us in connection with the Independence Trust Shares that we sold.

By the Court.

Q. When you say you sold Independence Trust Shares, what did you sell? How did you sell them? Was that on a monthly basis?

A. We sold them entirely through the Capital Savings Plan.

[fol. 159] Q. When they took this company over there was a Capital Savings Plan.

A. We didn't own the Independence Shares Corporation until 1932, your Honor.

Q. What I want to try to get is the difference in the operation of the two plans. We are talking a lot about these two plans and have never described them very clearly. The Independence Trust Shares Plan, you say, was operated by Rollins?

A. The Independence Trust Shares, themselves, were sold by investment dealers, they were sold in lump sums to investors of \$1000, \$2000 and \$10,000.

Q. You put up the investor's \$1000 and got a variety or a diversity for the investor?

A. Yes.

Q. Along comes Capital Savings Plan to enable the people to buy that on the installment basis?

A. Yes.

Q. You charged 9 per cent, 7½ per cent went to Capital Savings Plan and 1½ per cent to Independence, because Independence had some overhead?

A. Yes, but I want—

Q. I am trying to find out from you.

A. Yes. I would like to point out to you that prior to the time we took over and maintained Independence Shares Corporation, Independence Shares Corporation were retaining 3 per cent and paying Capital Savings Plan 6 per cent of the 9; they kept 3 and paid out 6. When we

took over Independence Shares Corporation we paid ourselves no salary and we broke the thing down to the most economical operating unit, and in that way we kept 1½ per cent in Independence Shares and paid ourselves in Capital Savings Plan 7½ per cent. In other words, the purpose was to have the Independence Shares Corporation cover its cost of doing business only through the 1½ per cent.

By Mr. Shapiro:

Q. Who got the benefit of the \$60 charge made? Capital Savings Plan or Independence Trust Shares?  
[fol. 160] A. Capital Savings Plan.

Q. Capital Savings Plan?

A. That's right.

Q. The paper which you read from and which was marked Plaintiffs' Exhibit C-2 refers to an agreement—rather, you said is the notice of the agreement which is contained in the exhibit marked for identification No. 30. It is, I assume, because these stocks that you sold became impaired that you decided not to retain them, is that right?

A. We sold them entirely upon the recommendation of investment counsel who was supervising the portfolio.

Q. I am not asking you whether it was on the advice of investment counsel.

Mr. Irwin: I submit that that answer was responsive.

By Mr. Shapiro:

Q. Did you sell them or did investment counsel sell them?

A. They were sold, as I testified on Monday, through regular brokers on order from the Pennsylvania Company instructed by us.

Q. Why did you sell them?

A. On the advice and recommendation of investment counsel.

Q. By what authority?

A. By the authority of that—where is it?

Q. This trust agreement?

A. Yes.

Q. Then I repeat it was the provision of the trust agreement which you pointed to as being advertised in this Exhibit C-2, which says that the trust agreement provides that should the depositor conclude that the stock of any company in the portfolio may or will become substantially

impaired in value, the depositor may instruct the trustee to sell such stock?

A. That is right.

Q. It was because of that?

[fol. 161] A. Yes.

Q. Was it your opinion that the stock had become impaired?

A. Yes.

Q. To what extent? Who else made an examination?

A. It may become impaired.

Q. I asked you whether in your opinion it had become impaired, and you said yes. Have you got a Board action on that?

A. Yes.

Q. Have you got the minutes?

A. Yes.

Q. Will you produce them, please?

A. Yes.

Q. I noticed in your minutes that you referred to the fact these stocks might be impaired, and, therefore, you sold them.

Mr. Irwin: He didn't sell them.

Mr. Shapiro: If your Honor pleases, may I proceed with my question?

The Court: I want Mr. Irwin not to do it.

By Mr. Shapiro:

Q. I want to direct your attention to the prospectus issued by your company on January 3, 1939, in which you list stock of the Philadelphia National Bank on page 19. I understand there you say that these securities were valued by the management of the depositor at the date of deposit in the sum of \$160,000. I am not reading the other figures, I am using round figures. \$160,000, and that on August 31, 1938, they were worth \$165,000. What was there about that stock that so impaired its value that you should sell it?

A. I am not talking about impaired values; we are talking about future impairment of values.

[fol. 162] Q. Future impairment of values. Now, wait, I don't think that I should ask that question, although it is a very important question; it might be misunderstood.

Isn't it true that when you sold this Philadelphia National Bank stock even in 1939 you received more than the price on August 31, 1938?

A. That is correct.

Q. Is that right?

A. That is correct.

Q. Why did you sell that stock?

A. We sold it on the recommendation of investment counsel, Mr. Porteous, in the court room, sir, if you care to have him testify.

Q. Is there anything in your contract or trust agreement that gives you the right to sell on the advice of somebody else? Is there?

A. Is there anything in our—

Q. Is there anything in your contract?

Mr. Irwin: What contract?

By Mr. Shapiro:

Q. That gives you the right to sell this stock on the advice of somebody else other than the board, or your own action?

Mr. Irwin: If your Honor pleases, I object to that question. I think Mr. Shapiro should designate what contract he is talking about.

The Court: Specify it. You mean the contract holder of the Plan or the contract with the trustee?

Mr. Shapiro: Doesn't that answer itself? How would I be interested in the—

The Court: You make him very unhappy by the form of your question.

By Mr. Shapiro:

Q. Do you understand who I mean? Did the contract buyer or investor, whatever you call him, the man who paid [fol. 163] \$10 a month to your company, or \$5—what is there in the contract with him that gives you the right to sell this stock on the advice of somebody else, some investment counsel? Will you point it out to me?

A. The right is not in the contract, but it is vested in our company through the Independence Trust Shares trust agreement.

The Court: Haven't we gone into that? We have gone into it.

Mr. Shapiro: I am not going into that contract.

The Court: I know, but we have gone into the question as to whether the plan holder—

Mr. Irwin: Where is it there?

The Court: Mr. Irwin, I want to curtail this examination, not lengthen it. There is some testimony on the subject. Exhibit C-2 has something in it.

Mr. Shapiro: If your Honor pleases, this is an entirely different question. They said they had a right to sell on impairment. He said they sold upon advice of investment counsel. Is there anything in the contract that gives them the right to sell on advice—investment counsellor's advice?

The Court: I don't think that is material, I don't think it is important as to why they made up their minds to do it. I don't see where that is relevant at all. It wouldn't justify a mistake, if they made a mistake, because they had been advised by investment counsel.

Mr. Shapiro: Would you mean to say if it hadn't authorized changing the stock they could change it?

The Court: No, that is apart from the thing. It is not a question of whether they were authorized to sell. You said was there anything in the prospectus, or any notice given that they could sell on the advice of investment counsel.

[fol. 164] Mr. Shapiro: Yes, if it were in the contract they had the right to do it.

The Court: If they had the right under the terms of their arrangement and notice were given, it doesn't make any difference whether they got advice from investment counsel.

Mr. Shapiro: There is nothing in the contract, itself, as to the right to sell under impairment. I want to know if there is anything that gives them the right to sell under the advice of investment counsel. There are about fifty contracts here; they know more about them than I do, certainly.

By the Court:

Q. Answer the question.

A. The right is vested in our company through the Independence Trust Shares trust agreement.

By Mr. Shapiro:

Q. Is there anything in the contract with the investor that refers to your right to do that?

A. The investor buys Independence Trust shares which are issued under this declaration of trust.

Q. Mr. Witness—

A. That answers the question.

Q. You can answer my question. I am asking you, you would know, you have handled these contracts. Is there anything in the contract that gives you the right to sell upon the advice of investment counsel? Can you answer that, yes or no?

Mr. Irwin: No.

Mr. Shapiro: If the Court please—

Mr. Irwin: Why aren't you fair with your questions?

Mr. Shapiro: If the Court please, either your Honor will have to say something to this gentleman, and I am doing [fol. 165] him a favor by calling him a gentleman—or I will have to forget myself; which I am trying not to do.

The Court: If we can't proceed in an orderly way, I will continue this matter for one week. There won't be any further statements made. At the next interruption you will address any question to the Court. I understand your zeal in your client's behalf, but we must try this in an orderly fashion. As I see it, I think you are provoking Mr. Shapiro into the use of adjectives that cause further protest on your part, and it won't do any good in the situation at all.

I am just as anxious as you are and anyone could be lest any false notion get abroad by reason of any question asked by the parties in this case. I don't think it will help the situation—I don't like to use the phrase—by inciting Mr. Shapiro's anger or resentment.

Mr. Shapiro: That is all he is inciting, resentment, not anger.

By Mr. Shapiro:

Q. Can you answer the question?

A. The contract, the Capital Savings contract plan certificate, calls for the investment of the funds less certain deductions, in Independence Trust shares. In the Independence Trust Shares trust agreement is vested the right of the directors of the Independence Shares Corporation

to make eliminations under certain conditions, all of which I read this morning.

Q. That is your answer?

A. Yes.

Mr. Shapiro: I won't press it any further, your Honor.

[fol. 166] C. LAMPE.

Direct examination.

By Mr. Shapiro:

Q. Now Mr. Lampe, where do you live?

A. Radnor.

Q. What is your business?

A. Chauffeur.

Q. Did you make any investment with the Independence Shares Corporation, or the Capital—

A. Capital Savings.

Q. Capital Savings; when? When was it?

A. Two and a half years ago.

Q. Two and a half years ago?

A. Or three years.

Q. How much did you pay per month?

Mr. Irwin: If your Honor please, unless there is some connection—

The witness: \$10 a month.

Mr. Irwin: —pardon me, sir, just a moment. Unless there is some connection between this man and the plaintiffs in this case, I certainly don't think that his testimony is relevant.

The Court: Why? You don't know what it is.

Mr. Irwin: Because there is no averment in this bill except as to these particular plaintiffs.

The Court: It is a class bill, as I take it.

Mr. Irwin: If your Honor please, it is the law I can't come in and sue a corporation unless we have a common interest. If your Honor please, each individual who holds a plan is the owner through the Pennsylvania Company of certain trust shares.

The Court: We have gone over that. I will overrule your objection and grant you an exception for the record.

Mr. Irwin: Very well, sir. I won't repeat my objection, sir, because it will apply to his testimony.

[fol. 167] By Mr. Shapiro:

Q. You said \$10 a month?

A. Yes, sir.

Q. Are you still paying?

A. No, sir.

Q. When did you stop paying?

A. About eight months ago,

Q. Who was the salesman who sold it to you?

A. Mrs. Balanos.

Q. Mr. or Mrs.?

A. Mrs.

Q. Did you come to see her, or did she come to see you?

A. She came to see me.

Q. Tell the Court what she told you about this when she was selling it to you.

A. That it was a savings plan.

By the Court:

Q. Which plan was this? Was this the Capital Savings?

A. Capital Savings.

By Mr. Shapiro:

Q. Tell us what you had to do, what you had to pay, and what you would get:

A. Pay in a certain amount of money and you get so much money in certain years.

Q. All right. How much did she tell you you had to pay in and in how many years did she tell you you would get your money?

A. You would get it in ten years.

Q. What would you get in ten years if you paid \$10 a month?

A. About a thousand to eleven hundred dollars for six hundred.

Q. For six hundred dollars you would get a thousand to eleven hundred?

A. Yes.

[fol. 168] Q. You were paying on the basis of \$10 a month?

A. Yes, my wife and I both had.

Q. Oh, you each took five?

A. Yes, we each took five.

Q. I am sorry.

By the Court:

Q. Would that be \$1000 to \$1100 each you were to get, or the two of you together?

A. Yes.

Q. Each would get \$1000?

By Mr. Shapiro:

Q. Each would get \$1000?

A. Yes.

Q. How many years did you say you had to pay?

A. About ten years.

Q. What else did she tell you went along with that? What else would you get if you continued to pay that money?

A. Insurance.

Q. What was the insurance, did she tell you?

A. If you died in a certain time or got killed, you got, I think it was, \$1000 insurance accidental death, something like that.

Q. Did you ever know, or did anybody ever tell you, that money was being invested in stocks?

A. Not at first.

Mr. Irwin: If your Honor please, I object to that as a leading question.

The Court: I will sustain the objection.

The Witness: Not at first.

Mr. Irwin: I ask it be stricken out.

The Court: Strike out the answer.

[fol. 169] By Mr. Shapiro:

Q. When you stopped paying eight months ago, what happened? Did you go to see anybody?

A. Yes, I went to the office.

Q. Whom did you see there? When you say, "the office," you mean what? Capital or the Independence Trust?

A. Capital Savings.

Q. Yes.

A. At the Commercial Trust Building.

Q. Whom did you see?

A. I can't recall who I seen down there, but—

Q. Is the person in court that you saw? Do you see them here in court?

A. No, I don't think so; I don't remember.

Q. You don't know the name?

A. No.

Q. Is that the only conversation you ever had with them?  
Is that the only time you went back?

A. Yes.

Q. Have you got any of your money back?

A. Yes, I got some money back.

Q. How much did you get back?

A. About \$36.

Q. Did you get any papers—

By the Court:

Q. How much did you pay in?

A. About \$125.

Q. \$125?

A. Yes, sir.

Q. You got back \$36?

A. Yes.

By Mr. Shapiro:

Q. Both of you together paid in \$125, or each?

A. No, both.

Q. You got back how much?

A. About \$36.

[fol. 170] By the Court:

Q. Each, or together?

A. Together.

By Mr. Shapiro:

Q. About \$18 each?

A. Yes.

Q. I show you a paper marked for identification Exhibit C-13 and ask you whether you got that; did you ever get a book like this from them?

A. Yes, sir.

Q. Look at it. What did you do with that book?

Mr. Irwin: May I see that book?

Mr. Shapiro: You have seen it before. It is Exhibit C-13.

Mr. Irwin: I haven't looked at it.

The Witness: They took that book from me.

By Mr. Shapiro:

Q. Who took it from you?

A. The office.

Q. When you got this \$36, did you get a paper or certificate of any kind?

A. I had to turn that back.

Q. You turned everything back and you got \$36 for it?

A. Yes, sir.

Mr. Shapiro: Cross-examine.

Mr. Irwin: Will your Honor indulge me a minute while I speak to Mrs. Balanos?

I won't be able to speak to her. If your Honor please, I move to strike out this witness' testimony as irrelevant and immaterial, not showing any connection whatsoever with the company or its officers.

The Court: Motion denied, exception.

[fol. 171] Cross-examination.

By Mr. Irwin:

Q. Mr. Lampe, was this plan that you took out in your name?

A. In both names.

Q. You had insurance with it, did you?

A. Yes, I did.

Q. And, so, a portion of the money that you paid in was deducted for the payment of the insurance, is that right? You had a life insurance policy, didn't you, with your plan?

A. Yes, that was connected with it.

Q. And you knew that part of the money you paid in would be deducted to pay the premium on that life insurance policy?

A. No, I didn't know nothing about that.

Q. You know if you have life insurance you ordinarily pay a premium?

Mr. Shapiro: I object to that.

The Witness: Oh, yes.

Mr. Shapiro: We are not going into the question of life insurance.

The Court: I will overrule your objection.

Mr. Shapiro: I don't want an exception.

The Court: Answer the question.

By Mr. Irwin:

Q. You know if you take out a life insurance policy you pay a premium on it, don't you?

A. Yes.

Q. And you knew that you had a life insurance policy in connection with your plan, didn't you?

A. Yes, sir.

Q. And you knew that part of what you paid in would be deducted to pay that premium, didn't you?

[fol. 172]. A. That wasn't explained to me that way.

Q. I know, but you knew enough from your own knowledge of life insurance and the fact that you had to pay premiums for them—

A. I know.

Q. And you knew that if you got life insurance here you would have to pay a premium upon it, didn't you?

A. It wasn't explained to me that way.

Q. I say you knew it, didn't you?

Mr. Shapiro: I think he answered.

By the Court:

Q. Did you know it or didn't you know it?

A. I knew there was insurance connected with it.

Q. Did you know you were paying for the insurance?

A. No, I was paying \$5 for the Capital Savings.

Mr. Shapiro: I understand the cards for this man are here in court. I should be very glad to offer them in evidence without having seen them. May I call for their production? Will you produce them?

Mr. Irwin: They are right here.

Mr. Shapiro: Let us have them.

Mr. Irwin: Of course, I object on the same ground, that this whole thing is irrelevant to this matter, and I ask if your Honor will rule on that and grant me an exception.

The Court: I will overrule your objection and grant you an exception.

Mr. Shapiro: Without having seen these cards or knowing what they are, I offer them in evidence and ask that they be identified with the subsequent numbers.

Mr. Irwin: Is the witness still here? I have one more question to ask him.

[fol. 173] Mr. Shapiro: There are two parts, mark each part, 36 and 37.

(A service call report with card attached relating to Mrs. Emily V. Lampe was marked Plaintiffs' Exhibit 36.)

(A service call report with card attached relating to Carl Lampe was marked Plaintiffs' Exhibit 37.)

By Mr. Irwin:

Q. Mr. Lampe, Mrs. Balanos or someone called on you, did they not?

A. Yes.

Q. To ask you whether you understood about this plan?

A. That was later on, that was about a year after.

Q. I ask you on the back of what is marked Exhibit 37 if that is your signature, Carl Lampe?

A. Yes.

Q. And the witness is Jane T. Balanos; that is Mrs. Balanos whom you referred to?

A. Yes.

Q. Is that a correct statement of what occurred at that interview, and the card that you signed, and it is dated March 4th?

Mr. Shapiro: Let him read it. Read it.

Mr. Irwin: Yes, surely; I want him to have full opportunity to read it.

The Witness: "Any question about the plan? No."

"Any change of address? No."

"Any change of beneficiary? No."

"Are the costs clearly understood? Yes."

At that time I understood them.

By Mr. Irwin:

Q. You understood them then?

A. Yes.

[fol. 174] Q. And you signed that card?

A. "Do you understand the value of your contract fluctuates with stock market prices? Yes."

"Are payment notices received promptly? Yes."

"Are monthly bulletins of interest? Yes."

Q. Those are the answers you made at that time, and that is your signature to it?

A. Yes, afterwards.

Mr. Irwin: Very well.

## Redirect examination.

By Mr. Shapiro:

Q. How long before you went to get your money back did that happen? What time did it happen? After you got your money back? When did that happen?

A. This was before I got the money back.

Q. How long before?

A. I am not quite certain, but it was a good while before.

Q. Where did you get the new information you say you had there?

Mr. Irwin: If your Honor please, I don't think this is re-direct examination.

The Court: Yes, you brought up something that hadn't been testified to on direct examination.

Mr. Irwin: Certainly, it is not proper for Mr. Shapiro to ask the witness how he knew.

The Court: He is covering the same matter covered by your cross-examination.

By Mr. Shapiro:

Q. You just told Mr. Irwin at that time you knew, but before you didn't know. When did you find out about this stock fluctuation?

[fol. 175] A. Different people told me.

Q. Were those people belonging to the company?

A. No.

Q. This was after you bought it?

A. Yes.

Mr. Shapiro: That's all.

Mr. Irwin: That's all.

AGNES LANDON, having been duly sworn, was examined and testified as follows:

## Direct examination.

By Mr. Shapiro:

Q. Miss Landon, you live at 1402 Spruce Street?

A. Yes.

Q. At one time you purchased a contract or certificate from one of these companies?

A. Yes.

Q. I don't know the name; do you know the name?

A. I am not so sure about the name, but I could identify the salesman who came to my place.

Q. Is he here?

A. No.

Q. What is his name?

A. I wouldn't know his name.

Q. How much money did you pay?

A. \$80.

Mr. Irwin: If Your Honor please, I object to this witness' testimony on the same grounds as I have already, but I further object to this witness' testimony because she says she doesn't know what plan she bought.

The Witness: Oh, yes, I do; Capital Savings Plan.

Mr. Shapiro: I was having some difficulty with that, myself. Thank you.

[fol. 176] Mr. Irwin: If it is a fact, I would just as soon bring it out for you.

Mr. Shapiro: I was trying to without offending the rules of evidence.

By Mr. Shapiro:

Q. To whom did you pay \$80?

A. To the Capital Savings Plan and to the Pennsylvania Company.

Mr. Irwin: Will you grant me an exception?

The Court: I will grant you an exception.

By Mr. Shapiro:

Q. Did you get one of these little savings books?

A. Yes, sir.

Q. Were you home, or did you go in the office?

A. I was in my home; the salesman came to my home and solicited this plan.

Q. What did they tell you?

A. Told me it was a very good investment, very good savings plan.

Mr. Shapiro: If your Honor pleases, I propose to follow this up by testimony that this company employed salesmen

of various numbers and kinds, and authorized them to go out and make these statements. I can't identify each salesman in each case, but I think if I have established the fact that it was the custom of the company to employ these salesmen generally and regularly that I have a right to offer this evidence.

Mr. Irwin: I object to any testimony being offered when the witness can't identify the salesman.

The Witness: I can identify the salesman, your Honor, if he were here. I am not so sure if his name is Gordon, or not.

[fol. 177] By the Court:

Q. How do you know he was a salesman?

A. He told me he was a salesman of Capital Savings Plan.

Q. Did you ever go to the office?

A. No, I did not.

By Mr. Shapiro:

Q. Did you go to the office and make payments?

A. No, sir, I sent them to the Pennsylvania Company on regular stamped envelopes printed for that purpose.

Q. Where did you get those stamped envelopes?

A. They were mailed back to me with the receipted book when I made my payments to the company.

Mr. Shapiro: I repeat the question, then, if your Honor please.

Mr. Irwin: I object.

The Court: At this time I will overrule your objection and grant you an exception subject to the provision that Mr. Shapiro make some identification of the person who made these representations, and that they were authorized to do so.

Mr. Shapiro: Is there a Mr. Gordon in court?

(There was no response.)

By Mr. Shapiro:

Q. Is he still in the employ of the company, Miss Landon?

A. I don't know.

Q. Can you find out?

By the Court:

Q. Where did you get the name of Gordon, Miss Landon? Is that your recollection?

A. That is my recollection.

Q. To the best of your recollection, his name was Gordon?

A. To the best of my recollection the name was Gordon.

[fol. 178] By Mr. Shapiro:

Q. Tell us what he told you?

A. I can't tell you everything he told me, because he talked very nearly an hour, but he did make it very clear to me that the Pennsylvania Company were the trustees for this affair. I was very much impressed by it being the Pennsylvania Company because at that time I had a trust fund there, which I still have, and that was the inducement of my taking these shares, because of the Pennsylvania Company.

Q. What was it he told you about the plan?

A. He told me at the end of ten years after depositing \$1200 with the Capital Savings Fund that I was to get \$2000.

Q. At the end of ten years?

A. At the end of ten years.

By the Court:

Q. Did you deposit it in monthly installments of \$10 each?

A. Monthly installments, less twenty-five cents a month.

By Mr. Shapiro:

Q. What was that for?

A. Supposed to go over to the Pennsylvania Company for them—

By the Court:

Q. Did you actually deposit \$10 a month?

A. Actually, yes, sir.

By Mr. Shapiro:

Q. Did he tell you of any charges made against that \$10?

A. None whatever except twenty-five cents to be deducted for the Pennsylvania Company as Trustee.

By the Court:

Q. Did he say you were guaranteed to get \$2000?

A. Guaranteed to get \$2000.

[fol. 179] Mr. Irwin: If your Honor please—  
The Court: I will grant you an exception.

By Mr. Shapiro:

Q. Did the salesman discuss with you anything about the Pennsylvania Company's relationship, or what they were doing with this plan?

A. No, I knew nothing whatever about that.

Q. You told me because you heard the Pennsylvania Company was in it—

A. He told me the Pennsylvania Company were trustees for this plan, that it positively could not go wrong because the Pennsylvania Company were backing them up in every way, shape and form.

Q. Did you discuss with him or he with you anything about building and loan associations?

A. Oh, yes, I asked him if it was something similar to a building and loan. He said they were better than a building and loan because a building and loan sometimes doesn't run out for eleven or twelve years, but this positively would be paid back to me in ten years.

By the Court:

Q. What do you mean?

A. The \$2000 was to be paid to me in ten years.

Mr. Shapiro: Cross-examine.

Mr. Irwin: Will your Honor indulge me for just a minute, sir?

Cross-examination.

By Mr. Irwin:

Q. When did you take out this plan?

A. Three years ago.

Q. Three years ago?

A. Yes.

Q. How long did you continue it?

A. Eight months.

[fol. 180] Q. You had a prospectus, didn't you?

A. I don't know anything about what a prospectus is.

Q. Did you have insurance?

A. No. He asked me to take insurance, but I told him I had sufficient life insurance.

Mr. Irwin: That's all.

By the Court:

Q. How much money did you put in and how much did you get out?

A. I put in \$80, and I sold it, fortunately, to a personal friend of mine who hasn't gotten anything out of it so far.

Q. Did you get your \$80?

A. Oh, yes, but not from Capital Savings Plan, from a friend of mine.

Redirect examination.

By Mr. Shapiro:

Q. Therefore, you have no interest in this case?

A. None whatever.

Recross-examination.

By Mr. Irwin:

Q. You got all the money you put in?

A. Yes.

Mr. Shapiro: But not from Capital Savings.

The Court: That is understood.

Mr. Irwin: I move to strike out this testimony as irrelevant and immaterial.

The Court: I will deny the motion and grant you an exception.

[fol. 181] ANTHONY PICONE, having been duly sworn, was examined and testified as follows:

## Direct examination.

By Mr. Shapiro:

Q. What is your business?

A. Shoemaker.

Q. Did you buy some of this Capital Savings Plan?

A. Yes, sir.

Q. Yourself and your wife, too?

A. Just myself; my wife is the beneficiary.

Q. She is the beneficiary?

A. Yes.

Q. How much did you buy? What did you pay in a month?

A. I have two of them.

Q. Two?

A. I have one in monthly installments, and another one paid up.

Q. Who sold them to you?

A. A salesman by the name of John Laird.

Q. Who was Laird connected with, do you know?

A. I couldn't tell you.

Q. Have you got any papers in this thing?

A. My paper is in the attorney's hands. I have a suit against the company to recover my money.

Q. Who is your attorney?

A. My attorney is Edward McLaughlin, from Chester, and R. K. Scott, from Philadelphia.

Mr. Irwin: If your Honor please, I would like to renew my objection to this witness' testimony on the same ground.

Will your Honor grant me an exception?

The Court: I will.

The Witness: The salesman came to me on the Capital Savings Plan.

[fol. 182] By Mr. Shapiro:

Q. The salesman introduced Capital Savings?

A. The salesman introduced Capital Savings, which was a very good company and in good standing, and the fellow was interested in buying a certificate, it would be a good thing. I explained it to my wife—

The Court: You can't tell us what you said to your wife.

By Mr. Shapiro:

Q. What did he tell you about it?

A. He told me the fellow was interested to buy some of this Capital Savings Plan.

Q. Did you buy it the first time he came, or did you talk to your wife, first?

A. Not right away, but I told him to come up in my home and talk this thing over with my wife and I would decide to buy one, I bought one.

Q. Before you bought it you went home and talked to your wife—

A. Oh, no, it wasn't bought yet.

Q. What?

A. It wasn't bought, I didn't buy before I gave him my wife's advice.

Q. You talked to your wife about it first?

A. Yes. He came to see us at the house.

Q. You were there, and your wife was there, and he was there?

A. That's right.

Q. What did he tell you about this plan, and what did he tell your wife? What did he tell your wife about it while you were there?

A. He told my wife and I, both, if we would buy some of this Capital Savings Plan, he said it was a good buy, we agreed to pay.

Q. What did he tell you to buy, how much were you going to buy?

[fol. 183] A. I bought one at \$25 monthly installments.

Q. How long were you to pay that?

A. Fifteen months.

Q. Fifteen months?

A. Yes.

Q. What did he say you were to get for it?

A. He told me that this was a ten-year plan; paying \$25 a month I have to pay \$3000 and at the end of ten years I would receive \$5000.

Q. \$5000 for your three?

A. Yes.

Q. What else did you take?

A. Then I took another one all paid up.

Q. Later on?

A. Later on, a month later.

Q. Was your wife there when you took that one?

A. Yes.

Q. Was this man there, too?

A. Yes.

Q. What did he tell you about this, what you had to pay and what you would get?

A. He advised me to buy—with the money I had cash he advised me to buy two units. The result was \$2400.

Q. \$2400 in cash?

A. \$2400 in cash, that was two thousand, four hundred dollars, and he told me that this money would grow up, would make profit fast, and he told me that in two years' time for \$2400 I would receive \$4000.

Q. You could get \$4000 in two years' time?

A. Yes.

Q. For that \$2400?

A. Yes.

Q. Where did you make the payments of \$25 a month?

A. In my own home.

Q. Where did you send them, or did somebody come to collect it?

A. I took out a book.

[fol. 184] Q. That is, for the \$2400?

A. Both.

Q. You kept on paying \$25, didn't you?

A. He came to collect monthly.

Q. Every month he would collect?

A. Every month he would collect.

Q. Did he give you a book?

A. Yes.

Q. Is the book the same as the one here?

A. My attorney has all my papers.

Q. C-13, was it like that? Is that the kind of book you got?

A. That's right.

Q. That is correct, is it?

A. Yes.

Q. Did he tell you anything about the Pennsylvania Company?

A. Yes, he told me the Pennsylvania Company was in back of it.

Q. That the Pennsylvania Company was in back of it?

A. Yes.

Q. Did you know who they were, the Pennsylvania Company?

A. Well, I heard about it, it was a bank of great reputation.

By the Court:

Q. Did you put up \$2400?

A. All paid up at once.

Q. \$2400?

A. And one \$25 a month installment plan.

By Mr. Shapiro:

Q. How long did you continue to pay the \$25 a month, how long?

A. Fifteen months.

Q. You haven't paid it now, you stopped paying?

A. I stopped payment, I find out—

Mr. Irwin: Now—

[fol. 185] By Mr. Shapiro:

Q. You stopped payment; what did he say to you about this money being invested in stocks?

Mr. Irwin: If your Honor please, I must object; that is a leading question.

The Court: Sustained.

By Mr. Shapiro:

Q. Did he tell you about your money being invested in stocks?

A. I never knew anything about stocks.

Mr. Irwin: If your Honor please, I object.

The Court: I sustain the objection. The answer will be stricken out.

Mr. Shapiro: That is all, cross-examine.

Mr. Irwin: I have no questions. If your Honor please, may I renew my motion?

The Court: Yes.

GRACE PICONE, having been duly sworn, was examined and testified as follows:

Direct examination.

By the Court:

Q. I don't believe we have your husband's address. Where do you live?

A. Garrett Avenue, Garrett Hill.

By Mr. Shapiro:

Q. Mrs. Picone, your husband testified that he wouldn't buy unless he talked to you, or unless you were there.

Mr. Irwin: My objection, sir, goes to this witness' testimony.

[fol. 186] By Mr. Shapiro:

Q. So, will you tell us what happened? Will you tell us what happened between the salesman and your husband while you were there, what you said, what you paid him, if anything?

A. What he said to me? In fact, he spoke to both of us.

Q. That's right.

A. I have the same statements to make Mr. Picone made.

Q. You tell us.

A. He said the Pennsylvania Company was in back of it, and also if we paid \$2400 in full we could collect in two years' time, we would collect \$4000.

Q. What about this \$25 a month plan, what was said about that? How long were you to pay, and what were you to get when you got through?

A. \$25 a month for ten years, and if we paid it regular, at the end of ten years we would receive \$5000.

Mr. Shapiro: Cross-examine.

Mr. Irwin: No questions.

By the Court:

Q. Did he tell you anything about the operation of this plan?

A. No, he didn't.

Q. Did he just say to you, put up \$2400 and you will get \$4000 in two years?

A. No, he really did explain. He said if we paid that in, the company does such wonderful business and being the Pennsylvania Company was in back of it we could trust our money into that company and—well, that is just what he said.

Q. He said they did such wonderful business?

A. Yes.

Q. Did he describe the business?

A. No, he did not.

[fol. 187] Q. Did he give you any idea of what was done with your money after the company took it?

A. No. He told us with this savings plan we could withdraw it at any time and—

Q. Withdraw it on what basis?

A. He told us about the one paid in full, we could withdraw that at any time we wanted.

Q. And get paid in full, did you say?

A. Yes.

\* \* \* \* \*

J. FITCH, direct examination.

By Mr. Shapiro:

Q. Do you understand my question?

A. No. Will you please repeat it?

Q. After you had gone to the bank and talked to the officer you said you then went home and talked to your mother. Did you go back and talk to anyone of the Capital Savings Plan, Inc., or Independence Trust Shares?

A. No, I didn't.

Q. You just went to a lawyer?

A. Yes, I was very disgusted.

Q. Now, then—

Mr. Irwin: If your Honor please—

Mr. Shapiro: We will take out the disgust.

The Court: Strike it out.

By Mr. Shapiro:

Q. Now, tell me what the salesman told you when he sold you this plan?

A. The salesman told me that the Pennsylvania Company was in charge of the money and they were backing the money up.

By the Court:

Q. Which salesman told you that?

A. Mr. Bill Dorsey.

[fol. 188] Q. By the way, when did this transaction take place when you first subscribed to this plan?

A. About a year and a half ago.

Q. That would be the latter part of 1937?

A. Yes, I think it was.

Q. In the fall of 1937?

A. Yes, I think it was.

By Mr. Shapiro:

Q. What else did he tell you?

A. And he told me that it was a safe investment and I didn't have to worry, and that if I didn't want to save after two years I could get my money, and if I did change my mind about it, I could get my money, but he said before two years I wouldn't be able to get the full amount, but after two years I would.

Q. Then what else did he tell you about it?

A. I can't remember everything.

Q. Did you buy a contract with or without insurance?

A. I bought a contract with insurance.

Q. What did he tell you about that?

A. But he didn't tell me anything about paying the insurance; I mean I didn't understand anything about that. I thought the policy enabled you to be insured.

Q. Not what you thought; what was it he told you about the insurance?

A. He told me I was insured by the company, but he didn't mention anything about buying his policy.

Q. For how much were you insured?

A. For \$600, I believe.

Q. Did you ever get an insurance policy?

A. No, I don't believe I did.

Q. Did you ever find out from him who was to get this insurance money?

A. No—

Mr. Irwin: If your Honor please—

The Witness: Yes, my mother—

[fol. 189] Mr. Irwin: Wait just a minute.

The Court: What is the question?

By Mr. Shapiro:

Q. Did you ever find out who was getting the insurance money, or did Mr. Dorsey tell you who was to get the insurance money?

Mr. Irwin: May I object to that as being a leading question?

The Court: I will sustain the objection.

Mr. Shapiro: Will you grant me an exception?

The Court: Yes, it is leading, Mr. Shapiro.

By Mr. Shapiro:

Q: What did Mr. Dorsey tell you with respect to when you would get all of your money, or how long you would have to continue to pay?

Mr. Irwin: If your Honor please, I object to that question. The witness has already covered it. It is leading.

The Court: She testified she was told by Dorsey if she paid \$5 a month for ten years she would get \$1000, and at the end of two years she would get all her money back if she wanted it, and that prior to two years she wouldn't get all her money back. I have it on my notes here, Mr. Shapiro. If you want it, the stenographer will read it.

Mr. Shapiro: All right, cross-examine, if your Honor has that recollection—may I ask one other question?

By Mr. Shapiro:

Q. Who was the beneficiary under the insurance policy?

A. My mother.

Mr. Shapiro: Cross-examine.

[fol. 190] Cross-examination.

By Mr. Irwin:

Q. Miss Fitch, the attorney that you went to was Isidor Ostroff, is that correct?

A. Yes, sir, that is correct.

Q. Did you know that he was the person who signed this bill of complaint?

A. May I see it, please?

Q. This is not his signature.

Mr. Irwin: Is the original here, Mr. Ludwig?

(Papers were produced.)

By Mr. Irwin:

Q. I show you a copy, Miss Fitch, of the original bill filed in this case, and ask you if that is Isidor Ostroff's signature?

A. I don't know whether this is Isidor Ostroff's signature, I only saw it once.

The Court: It is admitted by Mr. Shapiro.

Mr. Shapiro: No question about it.

By Mr. Irwin:

Q. Did Mr. Ostroff ask you to come in as a witness in this case?

A. No, Mr. Ostroff did not ask me to come in as a witness in this case.

Q. Who did?

A. Mr. Winer.

Q. And who is Mr. Winer? What is his full name?

A. Elliott M. Winer.

Q. Where does he live?

A. He is right here in court.

Q. He is right here in court?

A. Yes.

Q. Do you know whether he is connected with Mr. Ostroff?

[fol. 191] A. I don't know anything about that.

Q. Do you know what his occupation is?

A. Yes, he is an attorney.

Q. He is an attorney?

A. Yes.

Q. As a matter of fact, you went to Mr. Winer first, didn't you?

A. Yes, I did.

Q. And Mr. Winer said that Mr. Ostroff was going to handle this case of yours, isn't that right?

A. Yes, that's right.

Q. So that at the request of Mr. Winer, who was your attorney, you went to Mr. Ostroff, and Mr. Winer is the person who asked you to come in and testify today, isn't it?

A. Yes.

Mr. Shapiro: So did I. That's all. I move to strike out all the answers of this witness under cross-examination as immaterial and irrelevant, and not proper cross-examination. That is a matter of defense.

The Court: I can't understand the relevancy at all.

Mr. Irwin: If your Honor please, this witness comes in and testifies as to certain facts. It is certainly perfectly proper to show whether she has any interest, or whether those through whom she came in here had any interest in this case, and she was represented by Mr. Ostroff, and Mr. Ostroff signed this bill. Mr. Winer told her to go to Mr. Ostroff, and I certainly think it is perfectly proper cross-examination.

The Witness: I was represented by both attorneys.

Mr. Shapiro: That is all right.

The Court: I will grant your motion to strike out, and grant you an exception.

[fol. 192] Mr. Shapiro: By the way.

Mr. Irwin: May I ask that a record of this cross-examination be kept and put in the record?

The Court: It has to be put in the record.

Redirect examination.

By Mr. Shapiro:

Q. Have you settled your claim with the company?

A. Yes, I have.

Q. You got a certain amount of money?

A. Yes.

Q. How much was it?

A. They returned most all the money, with the exception of \$4 they took off for the insurance, I believe.

Q. Then you have no interest in the case, now?

A. No, I have no interest in the case.

By the Court:

Q. What was the \$4 they took off?

For insurance.

Q. You paid in, as I understand, \$60?

A. Yes.

Q. And you got back \$56 from the company?

A. Yes, the company paid back \$56 to the attorneys.

Mr. Shapiro: That's all, thank you.

The Court: It is of interest to the Court to know why this young lady got back her money, why that was done.

Mr. Irwin: Very well, sir, I will tell your Honor.

Mr. Shapiro: Just a minute, wait. May I respectfully object to your Honor's question unless it is made a matter of record?

The Court: I am perfectly willing to have it made a matter of record.

[fol. 193] Mr. Shapiro: I don't want the testimony of Mr. Irwin if it is to be a matter of record. It is my case.

The Court: I don't know whether this would constitute preferential treatment on the part of one plan holder.

Mr. Shapiro: There isn't any doubt about it, and we are ready to show that.

The Court: I will take the matter up later.

Mr. Irwin: If your Honor please—

The Court: I am going to inquire into it further.

Mr. Irwin: Very well, sir, and you won't develop any prejudged idea as to whether a preference was obtained by it!

The Court: Mr. Irwin, don't be so concerned about my mental reactions.

Mr. Irwin: That is all I ask.

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LAURA BURDETTE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. Where do you live?

A. I live in Radnor Way, Radnor, Pennsylvania.

Q. Were you at any time employed by the Capital Savings Plan, Inc., or the Independence Shares Corporation?

A. I was employed by Capital Savings Plan.

Q. When?

A. I was employed in the year of 1936.

Q. What was your employment? What were your duties?

A. I was a salesman for the Capital Savings Plan.  
[fol. 194] Q. Salesman?

A. Yes.

Q. What were you selling?

A. Capital Savings Plan.

Q. To whom?

A. To go out and sell it to other people, anybody that wanted to buy it.

Q. Did you sell?

A. I did, sir.

Q. What did you tell these people when you were selling that this plan was?

A. I told them this plan was—

Mr. Irwin: If your Honor pleases, may I object to any testimony of this witness?

Mr. Shapiro: Let me withdraw that question a minute.

By Mr. Shapiro:

Q. Before you began to sell these plans, did you have any conversation with anybody in the company as to what the plan was?

A. Yes, sir, I did. I had a conversation with Mr. Frank McCown, Jr.

Q. Frank McCown, Jr.; that is before you started to sell?

A. No, that was after I started to sell.

Q. I mean before you started to sell?

A. No, Mrs. Balanos coached me.

Q. What was Mrs. Balanos?

A. She was supposed to be a general agent.

Mr. Irwin: If your Honor please, I ask that be stricken; "she was supposed to be."

The Witness: Well, she was.

Mr. Shapiro: Will you take it subject to proof? I have the contract here.

[fol. 195] The Court: Very often witnesses use the word, "suppose," in expressing themselves.

By the Court:

Q. Do you know what she was?

A. Yes, sir.

Q. What was she?

A. She was a general agent.

The Court: All right.

By Mr. Shapiro:

Q. What did she tell you about this plan?

Mr. Irwin: If your Honor please, I object to anything that Mrs. Balanos said to this witness on the same ground as I have already.

The Court: Objection overruled, exception.

By Mr. Shapiro:

Q. Now, will you answer that question?

A. Well, she told me—first, she came to my house, and she tried to sell it to my mother, and at that time my mother was not interested in it—

Mr. Irwin: If your Honor please, I think that this is certainly irrelevant.

Mr. Shapiro: It is terrible.

The Court: Strike it out.

The Witness: Then at the time I became very much interested in it, myself, and I asked her particulars about it, and she induced me to sell the plan.

By Mr. Shapiro:

Q. What did she tell you about the plan, and what to tell the customers?

A. She told me to go out and tell the customers that this Capital Savings Plan was a very good investment, it was better than a bank, it was better than a building and loan, it was better than anything on the earth, and it had forty-[fol. 196] two of the best companies in the country that were backing it up. The Pennsylvania Company was supposed—was one of the companies, one of the banks that was backing it up, very, very much. I was supposed to emphasize that above everything else.

Q. What did she tell you, if anything, about the payments?

A. A person who wanted to pay \$5—

By the Court:

Q. You say, "supposed to emphasize"; were you told to emphasize it?

A. I was.

Q. That the Pennsylvania Company was one of the backers?

A. Yes. I went out and told the people if they wished to put \$5 in a month, that if anything happened to them, they died, or something like that, their people, whoever they would be, would get \$600, and I made \$10 out of that contract. If I sold a ten-dollar contract, I made \$20 out of it, and the beneficiary, whoever it may be, would get \$1200. At the end of ten years I read in this leaflet or prospectus you were supposed to get \$2000.

By Mr. Shapiro:

Q. Instead of using the word "suppose," I want you to tell me what you told them.

A. I read in the prospectus they would get \$2000 at the end of ten years.

Mr. Irwin: I object to this witness stating what she read in the prospectus. If she is going to quote from the prospectus, let's show what the prospectus is.

The Court: The objection is well taken.

By Mr. Shapiro:

Q. You just leave that for a minute, and come to the time you had a conversation with Mrs. Balanos and Mr. McCown, you said.

[fol. 197] A. Yes.

Q. What happened? What was that conversation?

A. Mr. McCown—

Mr. Irwin: If your Honor please, I ask that this witness, if she is referring to this conversation, state as to when and where it took place.

The Witness: I will, sir. It happened to be—

By Mr. Shapiro:

Q. What year and what month?

A. 1936.

Q. What month?

A. In July.

Q. What happened? What was the conversation?

A. And Mr. McCown, Jr.—

Mr. Irwin: If your Honor please, I would like to have her identify it as to where.

The Witness: In Mrs. Balanos' apartment on the porch.

By the Court:

Q. Where was her apartment?

A. In Radnor Inn, Pennsylvania.

By Mr. Shapiro:

Q. What address?

A. Just Radnor Apartments, Radnor Inn. Mr. McCown appeared there, and then I was introduced to Mr. McCown, and Mr. McCown and Mrs. Balanos were talking about the Capital Savings Plan, what was the best way to sell this plan, and I said to Mr. McCown, "If I have anything to say, it isn't right. I read from this prospectus that the way we sell it at the end of ten years or fourteen years these people will get \$2000, according to what they put in."

He says, "Indeed, that isn't right." He says, "Why, you will never sell anybody if you sell it like that." He says, [fol. 198] "You are not supposed to sell it like that." I thought at that time—

Q. Not what you thought; what was said.

A. Mr. McCown said, "You don't sell it that way. Tell the people in seven and a half years they are going to get \$2000."

By the Court:

Q. In seven and a half years on a \$10 payment per month?

A. That's right, but that was supposed to mature in seven and a half years.

By Mr. Shapiro:

Q. Did you have any literature in connection with this?

A. When I went to sell the people?

Q. Yes, with this seven and a half year proposition.

A. Yes, I did.

Q. I show you Exhibit C-3.

A. That's right, that is the only—

Mr. Irwin: I would like to see it.

Mr. Shapiro: You have seen it.

The Court: Let him see it again. There are thirty some exhibits.

Mr. Shapiro: I don't have to show counsel an exhibit after I have offered it in evidence each and every time I use it.

The Court: It is one of the courtesies we extend to counsel.

By Mr. Shapiro:

Q. Is this the paper you had with you when talking about the seven and a half year plan?

A. That is correct. This is the only thing I had with me.

Q. That is the only thing?

A. Yes.

[fol. 199] Q. Is there anything on that paper, or was there anything pointed out to you in connection with this seven and a half years?

A. I think this is it right here.

Q. Witness points to yield 21.3 per cent. under heading of seven over the word "years," on the inside of Exhibit C-3. Did you have any further conversation with him on that day?

A. No, I didn't have any further conversation with Mr. McCown. Well, I thought he was vice-president, and I took what he said, and that is the way I sold it thereafter to the people.

Mr. Irwin: May I ask that be stricken out?

Mr. Shapiro: I object to it, sir.

The Court: Why?

Mr. Irwin: Because she said she took what he said. She can't state her conclusions; she can state what happened.

The Court: You know what "I took what he said" means.

Mr. Shapiro: She said she followed it up. She took it and followed it up.

By the Court:

Q. Is that what you mean when you said "I took what he said"?

A. Yes, sir.

By Mr. Shapiro:

Q. Did you sell any contracts?

A. I did, sir.

By the Court:

Q. I would like to understand this clearly. At first you said when you sold these five and ten dollar contracts, at the end of ten years it would yield a thousand dollars in the [fol. 200] case of the five dollar plan, and two thousand dollars in the case of the ten dollar payment?

A. That's right.

Q. Am I correct in understanding you to say that Mr. McCown told you to emphasize that if \$10 monthly were paid, in seven and a half years there would be a payment of \$2000 to the purchaser?

A. That is right, that is what Mr. McCown emphasized to me to emphasize very strictly before I told them about anything, to tell them that.

By Mr. Shapiro:

Q. Did you ever see this or a copy of this Exhibit C-24?

A. No.

Q. You have never seen it?

A. I have never seen that.

By the Court:

Q. By the way, Miss Burdette, how old are you?

A. I am twenty-one, your Honor.

By Mr. Shapiro:

Q. How old were you when you were employed as an agent?

A. I was sixteen years old.

Q. Did you have a license?

A. No, sir.

The Court: There is something wrong with my mathematics, then, if it was—

The Witness: About seventeen or eighteen then, I think somewhere around there.

: By Mr. Shapiro:

Q. What are the names of some of these people you sold?

A. I sold to Mrs. Ring.

Q. Ring?

A. Yes; and I sold to Mr. Casson.

[fol. 201] Q. Who is he?

A. He is a garbage man that used to come around and pick our garbage up for us.

Q. When did you get your commission?

A. I got my commission as soon as Mr. Casson paid.

Q. What do you mean by that? You got a commission of ten dollars, didn't you?

A. Yes, sir.

Q. When did you get the commission?

A. When he gave me his money, that is when I got the commission. I handed it to Mrs. Balanos, I collected the money. I handed it to Mrs. Balanos, and Mrs. Balanos gave me \$10, because he had a \$5 contract.

Q. She gave you \$10, although he only paid you \$5?

A. That's right.

Q. You started to say your mother wouldn't take one.

Did you sell your mother one?

A. I sold my father one.

Q. What did you sell your father?

A. I sold my father the Capital Savings contract.

Q. For how much payment?

A. \$10 a month.

Q. With or without insurance?

A. With insurance.

Q. How many payments did he make?

A. He made about four payments.

Q. To whom?

A. To Mrs. Balanos.

Q. To Mrs. Balanos?

A. Yes, she had my father's book, and she had everything.

I took it to her.

Q. Did you get any of the money back?

A. No, sir. My father died in November, 1936, the 30th.

Q. Did you get a contract for your father?

A. Yes, sir.

Q. Where is it?

[fol. 202] A. I don't have it with me. My mother took the contract, book and certificates, and everything, and gave it to the Pennsylvania Company—

Mr. Irwin: I object. She can't testify what her mother did.

By the Court:

Q. How do you know what your mother did?

Mr. Irwin: If your Honor please—

By the Court:

Q. Were you there with her?

A. No, but my sister went down with my mother.

Q. Then you can't tell us.

Mr. Shapiro: Will your Honor take it subject to my proof that the Pennsylvania Company has it?

The Court: Of course, that would be independent oral testimony.

Mr. Shapiro: Sure. I am satisfied to strike it out. I will subpoena the Pennsylvania Company and have them produce it.

By Mr. Shapiro:

Q. Did you collect the insurance?

A. No, sir.

Q. Did you at any time collect from any of these people an extra charge for insurance?

A. No, sir.

Mr. Irwin: If your Honor please, I object to that as being an extremely leading question.

The Court: I will overrule your objection in this case.

Mr. Irwin: It is a classification of the thing.

The Court: I will overrule your objection and grant you an exception. Will you read the question?

[fol. 203] By Mr. Shapiro:

Q. When I say "extra," I mean over and above the \$10.

A. No, sir.

Mr. Irwin: If your Honor please, I object to that, sir.

The Court: I will overrule your objection and grant you an exception.

By Mr. Shapiro:

Q. What is the answer?

A. No, sir; I never did.

The Court: This woman testified there was insurance in connection with the plan; therefore, she can testify on any and all questions relating to the insurance, or any of the contracts she sold. That is the basis of my ruling. I state that for the record.

Mr. Shapiro: The purpose of my question is to show that there was never any charge paid for insurance; it was included in the \$10.

The Court: Let's get along, Mr. Shapiro.

Mr. Shapiro: Will your Honor indulge me just a moment?

By Mr. Shapiro:

Q. Did you have a contract of your own?

A. I did, sir.

Q. Did you get your money, or any of it?

A. When I asked to have my contract—when I went in to ask for my money back they sent me \$3. After that I consulted my lawyer, Mr. John J. Gilbride, Market Street National Bank Building, and asked him what I could do.

Mr. Irwin: I object to this.

The Court: I will sustain the objection. You can't tell us what your lawyer told you.

By Mr. Shapiro:

Q. Did you get any money back?

[fol. 204] The Court: She already testified she got \$3.

By Mr. Shapiro:

Q. I mean in addition to the \$3 did you get any money back?

A. Yes, I did. That is what I want to tell you about.

Q. How much?

A. I got the remainder of my \$40 I paid in—my \$30 I put in.

Q. Did you get it yourself, or through counsel?

A. I got it through my counsel.

By the Court:

Q. Did you have a \$10 or a \$5 contract?

A. \$5 contract.

Q. You paid six months?

A. Yes.

By Mr. Shapiro:

Q. Did you get \$3 sent to you by check or cash?

A. By check.

Q. Did you get an additional \$27?

A. Yes, sir.

Q. By check?

A. Yes, sir.

By the Court:

Q. Whose check was it?

A. Pennsylvania Company.

Q. When was it you received this check for the \$27?

A. After I told him I wanted my contract repudiated.

Q. What year, 1937 or 1938?

A. 1937, I believe.

Mr. Shapiro: All right.

The Court: Anything else, Mr. Shapiro?

Mr. Shapiro: That is all, sir. I call for the production of the card of Miss Fitch and Miss Burdette if it is here. I am not going to complain if it is not here, but I would like [fol. 205] to have the ledger card or the account card that the company has with these two last witnesses, this witness and the previous witness.

Mr. Irwin: We haven't those, sir; we will get them.

Mr. Shapiro: I will ask that they be produced for the Court.

Mr. Irwin: May I ask your Honor if we may have a five minute recess to get posted on this witness' extensive examination?

The Court: We will recess for five minutes.

(Recess at 10:55 o'clock A. M.)

LAURA BURDETTE, resumed.

The Witness: Your Honor, I would like to make a correction there about Mr. Casson. He wasn't a garbage man.

By the Court:

Q. Will you speak so counsel can hear you?

A. I would like to make a correction about Mr. Casson. He was not a garbage man, but he was going around selling vegetables at people's houses. That is a correction I would like to make.

The Court: That is a correction she would like to make.

Mr. Irwin: That is perfectly proper, if your Honor, please.

Mr. Shapiro: Cross-examine.

Cross-examination.

By Mr. Irwin:

Q. Miss Burdette, do you know Cosme Balanos?

A. I do.

[fol. 206] Q. How long have you known him?

A. I have known Mr. Balanos as long as I have known

Mrs. Balanos.

Q. How long might that be?

A. Ever since 1935.

Q. Ever since 1935?

A. That's right.

Q. Were you ever employed by Mrs. Balanos? Did you ever do any work at her house?

A. I was employed by Mrs. Balanos to sell Capital Savings Plan.

Q. Did you ever do any work around her house?

A. I did. I helped her when she was having a party, or something like that.

Q. And would you come in there a number of times and help her in that way?

A. I don't know the number of times. Whenever she asked me; that wasn't very much.

Q. That wasn't very much?

A. No.

Q. How often were you at Mrs. Balanos' house in 1936?

A. Oh, I don't remember that.

Mr. Shapiro: I don't know whether we are going into muck-raking or what.

The Court: Come up to side bar and make an offer of proof.

Mr. Irwin: If your Honor please, I don't think I am required to make an offer of proof on cross-examination.

The Court: I will ask you to make an offer of proof.

(The following transpired at side bar.)

The Court: I won't have any muck-raking here.

Mr. Irwin: If your Honor please, I am not engaged in muck-raking. I am going to show the relationship between

[fol. 207] Mrs. and Mr. Balanos, the fact that they are at swords-points at the present time, that this woman is friendly to Mr. Balanos. I assure you that I have no desire to do anything that is improper.

Mr. Shapiro: I don't object to having an admission on the record that this lady is friendly to Mr. Balanos.

Mr. Irwin: I can bring that out on cross-examination.

The Court: I wouldn't permit any of the private life of any of the defendants to be brought in.

Mr. Shapiro: Then I will have to go into the relationship with Mr. McCown and this woman which my client told me about. Wouldn't that be nice?

The Court: I wouldn't allow it.

Mr. Shapiro: That is where it leads to.

Mr. Irwin: I can show interest.

The Court: He isn't a party to the suit.

Mr. Shapiro: He isn't called yet.

Mr. Irwin: He will be called.

Mr. Shapiro: How do you know?

The Court: Make an offer of proof and I will rule on it.

Mr. Irwin: If your Honor please, I intend by this examination to show interest and bias of this witness.

The Court: In what way?

Mr. Irwin: If your Honor please, that is my offer of proof on cross-examination.

Mr. Shapiro: I have no objection to showing interest and bias of this witness, but I have an objection to showing in [fol. 208] terest and bias by the testimony that I understand he proposes to offer.

Mr. Irwin: If your Honor please, I don't think I am required to advise my friend—

Mr. Shapiro: I will object to his questions as they develop, if your Honor please.

The Court: All right.

(End of side-bar discussion.)

By Mr. Irwin:

Q. How often in 1936 were you at the Balanos home?

A. How often?

Q. Yes.

A. I couldn't tell you how often I was there. That is a very poor answer to ask me, because I don't remember how often I was there.

By Mr. Shapiro:

Q. You mean it is a poor question?

A. Certainly.

Mr. Irwin: I ask you to instruct the witness not to tell me what questions to ask. If she can't answer them, she may say she doesn't know.

The Court: Don't argue with counsel. Just say yes or no if you can answer the question, and if you can't answer it, say so.

The Witness: All right.

By Mr. Irwin:

Q. I understand from that, Miss Burdette, that you don't know, is that right?

A. That's right.

Q. Does that same answer apply for 1937?

A. Right.

Q. At the end of 1937 there was some difficulty which developed between Mr. and Mrs. Balanos?

Mr. Shapiro: I object to this as immaterial.

[fol. 209] The Court: Objection sustained. I will grant you an exception:

By Mr. Irwin:

Q. Since the end of 1937 have Mr. and Mrs. Balanos been living together?

Mr. Shapiro: I object as immaterial, irrelevant, and scandalous.

The Court: Objection sustained. I will grant you an exception.

By Mr. Irwin:

Q. Have you seen or been in Mrs. Balanos' house since the end of 1937?

A. No.

Q. Have you seen Mr. Balanos since that time?

A. I have.

Q. How often have you seen him in the last three weeks?

Mr. Shapiro: Objected to as immaterial. Mr. Balanos is not a party to this case.

The Court: Objection sustained. I will grant you an exception.

Mr. Irwin: If your Honor please—

The Court: I have ruled. If I have erred, you have your remedy.

By Mr. Irwin:

Q. Have you seen Mr. Shapiro about this case since it was instituted three weeks ago today?

A. I have seen Mr. Gilbride, and Mr. Gilbride sent me to Mr. Shapiro.

Q. Have you seen Mr. Shapiro?

A. I have.

Q. How often?

A. How often?

[fol. 210] Q. Yes.

A. About twice.

Q. Have you gone to his office?

A. I have.

Q. Have you gone in the company of Mr. Balanos?

A. I have.

Q. Did Mr. Balanos ask you to go to Mr. Shapiro's office?

A. No.

Q. Did he tell you that he was going to Mr. Shapiro's office?

Mr. Shapiro: Objected to as immaterial.

The Court: I sustain the objection.

Mr. Irwin: Will your Honor grant me an exception?

The Court: I will grant you an exception.

By Mr. Irwin:

Q. Whom did you talk to in Mr. Shapiro's office?

A. I spoke to Mr. Barkan and Mr. Shapiro.

Q. Mr. Barkan—

Mr. Shapiro. Associate counsel in this case appearing with me.

By Mr. Irwin:

Q. Did you see Mr. Rudenko?

A. I did.

Q. Did you talk to Mr. Rudenko?

A. I did.

By Mr. Shapiro:

Q. They are nice people, aren't they?

A. They certainly are. They have brains.

Mr. Irwin: I haven't in any way reflected on Mr. Shapiro. These remarks during my cross-examination are uncalled for.

[fol. 211] The Court: You are absolutely right. We will strike out the remarks made by Mr. Shapiro.

Mr. Shapiro: That leaves me in the air if the answer is out.

The Court: It is a self-serving declaration.

Mr. Shapiro: Let me say very seriously, if your Honor pleases, I don't want to object to this testimony the way it is being given, but I have never had anybody try to do this on me before, and if it keeps up much longer I shall be obliged to make a motion in connection with it which I wouldn't like to make. Just because of the smile on my face doesn't mean that I do not resent this.

The Court: If the door is put ajar, I will let it remain open.

Mr. Shapiro: My friend was talking about newspapers, about his company, but I also have a reputation, and the same people that he is so much afraid of might get some impression it is unheard of that a lawyer should consult with a witness and find out what she knows about this case. I state here very frankly I talked to this woman and that I talked to several other witnesses and that I talked to Mr. Balanos.

The Court: Of course, it is necessary that you do so in order to prepare your case.

Mr. Shapiro: You wouldn't think so from the way these questions are being put, but I am not worried about that. I can give the proper answer at the proper place.

The Court: It won't affect the Court. I suppose Mr. Irwin has talked to his clients, too. If he hasn't, he should have.

Mr. Irwin: I have, your Honor.

The Court: All right.

[fol. 212] By Mr. Irwin:

Q. Who first told you about this case?

A. Who first told me about it?

Q. Yes.

A. I don't understand what you mean.

Q. Who first told you that this bill in equity had been filed by Mr. Shapiro?

A. I heard it from my lawyer, Mr. Gilbride.

Q. When?

A. About three weeks ago.

Q. Had you been in Mr. Shapiro's office prior to that time?

A. No.

Q. How often have you been there and talked to either Mr. Rudenko or to—

A. I have been there twice.

Q. Twice?

A. I told you that before.

Mr. Irwin: Thank you.

The Court: Anything else?

Mr. Irwin: Yes, if your Honor please.

By Mr. Irwin:

Q. You got your \$27 back from the Pennsylvania Company, didn't you?

A. I did after I made considerable complaint.

Q. And you told them that you were a minor at the time you bought this plan and you choose to disaffirm the contract?

A. That's right.

Q. And they gave you your money back?

A. That's right, after I made that complaint. Before that they sent me \$3.

Mr. Shapiro: You have already told us that; you don't have to repeat it.

[fol. 213] By Mr. Irwin:

Q. Mr. Shapiro has asked you about a certain chart.

A. Yes.

Q. Do you know what that chart is?

Mr. Shapiro: I suggest that we have the exhibit number on the record so that we know what he is talking about.

Mr. Irwin: You are entirely correct. I will be very glad to put it in. It is Plaintiff's Exhibit C-3.

The Witness: You mean what I was asked before?

Mr. Irwin: No.

The Witness: What do you mean?

By Mr. Irwin:

Q. Do you know what that chart is?

A. This chart here?

Q. Yes.

A. From what I understand, this chart is supposed to be—at the end of so many years you are supposed to get the money back, and according to here it has seven or eight.

Q. Do you know at the other end of the chart there is a date at the bottom 1898, and at the top it is 14; that is, it reaches the level of 14. Doesn't that mean that if these forty-two securities were bought in 1898 and \$10 was paid every month toward the purchase of them, that in fourteen years it would equal \$2000?

A. It has the same down here.

Q. Isn't that what that means?

A. I don't know. I don't know much about this business only what I was told.

Mr. Irwin: All right, that's all.

Mr. Shapiro: That's all.

By Mr. Irwin:

Q. Pardon me, I have just one more question. Did you ever receive any checks from the Capital Savings Plan, Inc.?

[fol. 214] A. No, sir.

Q. Did you ever receive any checks from Independence Shares Corporation?

A. No, I didn't work for them.

Mr. Irwin: That's all, thank you.

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COSME BALANOS, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. Mr. Balanos, you have talked to me and to my associates about this Capital Savings Plan?

A. Yes, sir.

Q. How did you come to me?

A. I saw in the newspapers that you filed a suit in equity, and I have a claim against the company, and I came to see you right away about my claim.

Q. Did you tell me some facts about the matter?

A. Yes, sir.

Q. Will you just sit back and answer some questions, and please talk slowly, it is hard to understand you as it is, and only answer the questions. Were you employed by the Capital Savings Plan?

The Court: Just find out where he lives.

By Mr. Shapiro:

Q. Where do you live?

A. Temporarily in the Delaware County prison.

Q. Where do you live outside?

A. 121 Ardmore Avenue, Ardmore, Pennsylvania.

By the Court:

Q. How long have you been there temporarily?

A. Temporarily since last Friday, your Honor.

Q. March 30th, the day before yesterday?

A. Day before yesterday, Thursday night.

[fol. 215] By Mr. Shapiro:

Q. Were you employed by the Capital Savings Plan; Inc.?

A. Yes, sir.

Q. When?

A. I was employed since 1932, and I have here—

Q. I have asked you a question, you have answered it. If we are going to make speeches we won't get through. What were your duties, what were you doing?

A. I was going around to get Capital Savings Plan subscriptions.

Q. Did you have a license?

A. No, sir.

Q. Did you have a contract with the company?

A. No, sir.

Q. Did your wife have a contract with the company?

A. Yes, sir.

Q. Did you sell Capital Savings Plan?

A. Yes, sir.

Q. Did you get commissions?

A. Half and half, fifty-fifty.

Q. Whatever commissions you got were through your wife?

A. Yes, sir.

Q. We will leave that go for the time being. Tell the Court what you told these people when you sold them or attempted to sell them these certificates.

Mr. Irwin: I object to that question. If your Honor please, I object to it on the general ground, but I certainly object to it—but your Honor has already ruled on it, and I assume your ruling would be the same and an exception would be granted to me. I also object to any statement from this witness as general as that, what did you tell these people?

The Court: If he asked any other questions.

Mr. Irwin: I think he should be confined to particular people, particular instances, particular times, and not be [fol. 216] permitted to make a speech, on a thing like that.

The Court: I think you might divide it.

Mr. Shapiro: I am withdrawing the question, sir, he gave me a name—

Mr. Irwin: Pardon me, Mr. Shapiro.

Mr. Shapiro: All right.

Mr. Irwin: In addition, I object to this witness testifying as to anything that was said by him at any time, because he has already testified that he had no contract with us and he was not an agent.

Mr. Shapiro: I will withdraw this witness for a moment.

Will you step down a minute, please?

Mrs. Balaros: Take the stand, please.

JANE T. BALANOS, having been duly sworn, was examined and testified as follows:

#### Direct Examination.

By Mr. Shapiro:

Q. Where do you live?

A. Radnor.

Q. Pennsylvania?

A. That's right.

Q. Were you an employee of Capital Savings Plan, Inc.?

A. I was, sir.

Q. What was the nature of your employment?

A. I originally was a sales person, and I became general agent.

Q. Did you have a contract?

A. I certainly did.

Q. Will you produce it?

[fol. 217] A. I haven't it with me.

Q. I show you a paper marked for identification Exhibit 38—

(Agreement dated the first day of January, 1936, between Capital Savings, Plan, Inc., and Jane T. Balanos, was marked Plaintiffs' Exhibit No. 38 for Identification.)

By Mr. Shapiro:

Q. And ask you whether or not that paper bears your signature?

A. It does, sir.

Q. Is that the contract you have with this company?

A. I suppose it was the original one, yes.

Q. First of January, 1936?

A. That's right.

Q. How long did you continue to work for the company?

A. I have continued to work for the company.

Q. You are working there now?

A. Yes, sir.

By the Court:

Q. Since when?

A. I think it was in 1933, '32 or '33, I am not quite sure.

Q. 1932 or '33 and then you became general agent in 1936?

A. That's right.

By Mr. Shapiro:

Q. Just what does that mean, general agent? Did you have a right to employ other people?

Mr. Irwin: If your Honor please, I think the contract speaks for itself.

The Court: The contract speaks for itself.

[fol. 218] By Mr. Shapiro:

Q. Did you employ other people?

A. Yes, sir.

Mr. Shapiro: Of course, the contract doesn't always speak for itself, if your Honor please.

The Court: You have had her speak for it, too.

By Mr. Shapiro:

Q. Did you have group insurance? Did you come under the group insurance plan?

A. Yes, I did.

Q. Were you an employee of the company?

A. Yes, I was an employee of the company.

Q. Did you notice in your contract with this company it says that you are not an employee of the company?

A. Well, I was employed. I am probably agent for the company, I worked for the company.

Q. Under paragraph 19, the contract reads:

"Relation of Parties. It is understood and agreed that nothing in this Agreement contained shall be construed as creating the relationship of employer and employee between Capital and Salesman (Agent or Agent's Salesmen). Salesmen (Agent and Agent's Salesmen) may adopt such arrangements as he desires with regard to the details of the work and the manner of performance hereunder, free of control by Capital; provided, however, that the work shall be done by Salesman (Agent and Agent's Salesmen) in such manner as will be consistent with the terms of, and the results contracted for, under this Agreement."

Did you know that provision was in your contract?

A. I know I was an agent and employed by the company. I don't know what that is all about. I think they know. I worked for them. I was general agent for them.

Q. Where did you get that knowledge, from the contract, or from conversation with the officers?

[fol. 219] Mr. Irwin: If your Honor please, I think the contract speaks for its 'f again, and states what the relationship is.

The Court: I will overrule your objection and grant you an exception.

Mr. Shapiro: Read the question, please.

(The question was repeated by the reporter as follows:

"Q. Where did you get that knowledge, from the contract, or from conversation with the officers?"

The Court: Read the previous answer, I don't quite understand.

(The testimony was repeated by the reporter as follows:

"I know I was an agent and employed by the company. I don't know what that is all about. I think they know I worked for them. I was general agent for them."

Q. Where did you get that knowledge, from the contract, or from conversation with the officers?"

The Witness: What knowledge?

By Mr. Shapiro:

Q. The knowledge you were general agent.

A. I was appointed a general agent.

Q. By whom?

A. By the officers of the company.

Mr. Shapiro: That is all the questions I have to ask you.

Mr. Irwin: No questions.

Mr. Shapiro: Now, Mr. Balanos, will you take the stand?

[fol. 220] COSME BALANOS, recalled.

Direct examination (Continued).

By Mr. Shapiro:

Q. Mr. Balanos, with whom did you make arrangements that you should endeavor to sell investments for the Capital Savings?

A. With Mr. McCown.

Mr. Irwin: I object to that, sir. The witness has already testified he had no contract with the company.

Mr. Shapiro: I asked him with whom he made his arrangements—

The Witness: With Mr. McCown.

Mr. Shapiro: Pardon me, please—that he should sell these contracts to investors.

The Court: I will overrule your objection and grant you an exception.

By Mr. Shapiro:

Q. Now, what is the answer?

A. With Mr. Frank C. McCown, Jr.

Q. Did you sell any of these contracts?

A. Yes, I did.

Q. To whom?

A. There are contracts, one was to Mr. and Mrs. Sievers.

Q. Sievers?

A. Yes.

Q. Do you know where they live?

A. They used to live at Mrs. Billings. Mr. and Mrs. Deloye.

Q. Who else?

A. Mr. Frank Kromer.

Q. By the way, where do Mr. and Mrs. Deloye live?

A. Larchmont.

[fol. 221] Q. Where does Mr. Kromer live?

A. Merion.

Q. Is that H. J. Kromer?

A. No, his first name is a funny name.

Q. Who else?

A. I practically in the beginning sold everybody that she sold.

Mr. Irwin: I object to that if your Honor please, and ask that the answer be stricken out.

The Court: Why?

Mr. Irwin: Because the witness said, "I practically sold everybody"; he must state to whom he sold.

The Witness: I sold.

Mr. Shapiro: Will you keep out of the argument and just reply to the questions? I have told you that outside, and I have told you here.

The Court: What was his answer? "I practically sold everybody?"

Mr. Shapiro: "I sold everybody that she sold."

By the Court:

Q. Whom do you mean by "she"?

A. My wife.

By Mr. Shapiro:

Q. You said you went out together with her to sell?

A. Yes.

Q. Do you remember any other occasion? If you remember, say so; if you don't, say so.

A. I remember plenty of names.

Q. Give me the names of those you remember that you sold yourself or in company with your wife.

A. Fairweather. She testified to that effect in the divorce proceedings.

Q. I told you you should please answer the questions.  
[fol. 222] A. Pardon me, sir.

Mr. Shapiro: I ask that that answer be stricken out.

The Court: Strike it out.

Mr. Irwin: If your Honor please, I don't think Mr. Shapiro can move to have his own witness's answer stricken out.

The Court: I thought it was not responsive to the answer. I will direct of the Court's own motion that it shall be stricken out.

Mr. Irwin: Will your Honor grant me an exception?

The Court: No, I won't grant you an exception. It is entirely irrelevant what this woman testified to; it becomes hearsay evidence.

The Witness: Charles Bashore.

By Mr. Shapiro:

Q. Where does he live?

A. Glenloch, it is outside of Paoli in the Farm School. It is a cousin of Mr. Bashore—

The Court: Strike that out.

The Witness: I sold to Mr. Wilkins.

By Mr. Shapiro:

Q. Where does he live?

A. Same place, he is a teacher there.

Q. Who else?

A. I sold to Miss Gertrude Yarnell.

Q. Where does she live?

A. At that time she was living in Yeadon.

Q. Any more?

The Court: Do we have to go back over five or six years' sales?

[fol. 223] The Witness: I have to go back, but I can't remember everything.

By Mr. Shapiro:

Q. What did you tell these people that this plan was?

A. The plan—

Q. Listen to the question. First of all, from whom did you get information and instructions so far as the company is concerned as to what this plan was and what you were to tell the people?

A. From the company.

Q. Who, particularly?

A. It was a man by the name of Shelton, Herb.

Q. What was his connection with the company?

A. He was vice-president, sales manager, I think everything.

Q. Who else?

A. There used to be a fellow by the name of McCutchin.

Q. What was his job?

A. Sales manager.

Q. Who else?

A. A fellow by the name of Allen Young.

Q. Who else?

A. And Mr. McCown.

Q. When these people told you what this plan was and what you were to tell the investors, what was it they told you?

A. They told us to sell the investment with the insurance, \$10, to make a deal of \$2000.

By the Court:

Q. \$10 a month?

A. \$10 a month; yes, sir, your Honor, and they might get \$2000 sooner than ten years, when they didn't have to pay any longer, but in no event they are going to invest more than \$1200.

By Mr. Shapiro:

Q. That is on a \$10 payment?

A. \$10 payment. Then they told us about insurance.

[fol. 224] Q. What did they tell you about that?

A. They told us the additional cost which the investor will not have to pay at once, like in paying every month, but the company deducts that.

Q. Out of the \$10?

A. Out of the \$10; they can insure that plan by an insurance policy on the life of the prospect.

Q. What was that insurance?

A. That insurance was \$600 for \$5 a month, and \$1200 for \$10 a month.

Q. When was it payable, and how?

A. That was a controversy, how it was payable. I couldn't find out how it was payable.

Q. What did they tell you?

A. It was aid to the investor, to the beneficiary, rather, of the plan.

Q. When?

A. As soon as he died or proof of this was submitted to the company.

Q. In connection with that matter I ask you whether you have ever seen a copy of this Exhibit C-24?

A. Yes, sir; I did.

Q. Where did you see it?

A. In the kit they gave us to go out and sell.

Q. You mean the company gave you kits?

A. Yes, sir.

Q. What was in the kits?

Q. First of all, the first page was the doors of the Pennsylvania Company.

Q. The doors of the Pennsylvania Company?

A. One Mr. Yellin made. After we take the doors there was a financial statement of the Pennsylvania Company. Then we had a letter from Mr. Kriebel, vice-president of the Pennsylvania Company. That letter was sent to a man by the name of O'Connor in Trenton, Pennsylvania, in which Mr. Kriebel told him how wonderful is the investment, and how he, himself, bought a plan.

[fol. 225] By the Court:

Q. Who was Mr. Kriebel?

A. Vice-president and cashier of the Pennsylvania Company.

Mr. Irwin: I think he means Mr. Kriebel who is cashier and vice-president.

The Court: Spell it.

Mr. Irwin: K-r-i-e-b-e-l.

The Witness: That letter was sent out to this man as one of the salesmen approached him for a plan, and he wanted

to know something direct from the Pennsylvania Company, what kind of an investment was that.

By Mr. Shapiro:

Q. What was the next?

A. Next was a letter from Lukens Steel Company, and that letter was addressed to Mr. Heckscher, who used to be on the board of directors of Capital Savings Plan, and in this letter he stated that he had investigated this plan, he had talked it over with Mr. Kriebel, and he gives permission to contract employees for the plan.

By the Court:

Q. Who said that?

A. President of the Lukens Steel.

By Mr. Shapiro:

Q. Gives you permission to canvass the employees of the Lukens Steel Company?

A. Yes, sir.

Q. What else?

A. There were several other letters of that character, and then there were some things about sending checks out.

Q. When was that?

A. That is insurance checks to show how they pay when a man dies. There was some checks from the Connecticut General, and then there were some other checks made by the [fol. 226] Connecticut General to the Pennsylvania Company, Trustee.

Q. To whom was that made out?

A. This is made to the Pennsylvania Company, Trustee, but there were some other checks there from the Pennsylvania Company, Trustee, to the beneficiary.

Q. I show you other papers which I will have marked for identification Exhibits 39, 40, 41, 42, 43, 44, and 45 for Identification.

(Copy of letter dated February 1, 1936, to Capital Savings Plan, Inc., from Connecticut General Life Insurance Company, was marked Plaintiffs' Exhibit 39 for Identification.)

(Copy of letter dated December 18, 1936, to Capital Savings Plan, Inc., from Connecticut General Life Insurance

Company was marked Plaintiffs' Exhibit 40 for Identification.)

(Copy of letter, undated, on the stationery of Connecticut General Life Insurance Company, in regard to William C. Kahn, was marked Plaintiffs' Exhibit 41 for Identification.)

(Copy of letter undated, on the stationery of Capital Savings Plan, Inc., in regard to Miss Dorothy M. Evans was marked Plaintiffs' Exhibit 42 for Identification.)

(Copy of letter dated January 31, 1935, on the stationery of Capital Savings Plan, Inc., in regard to Robert W. Wilsbach, was marked Plaintiffs' Exhibit 43 for Identification.)

(Copy of letter dated June 28, 1935, to Capital Savings Plan, Inc., from Connecticut General Life Insurance Company was marked Plaintiffs' Exhibit 44 for Identification.)

(Copy of letter dated June 4, 1934, to R. A. Bonner, Treasurer, Capital Savings Plan, Inc., from Connecticut [fol. 227] General Life Insurance Company, was marked Plaintiffs' Exhibit No. 45 for Identification.)

By Mr. Shapiro:

Q. I ask you to tell me whether these are copies of papers that were in that kit?

A. Yes, sir.

Mr. Shapiro: I offer those in evidence, if your Honor please.

Mr. Irwin: I object to the offer of those until they are relevant. Until that is shown I want to note my objection, sir.

The Court: I will overrule your objection and grant you an exception.

Mr. Shapiro: The object of this is to show the persons did not get the checks at all, as was represented to them but the checks went to the Pennsylvania Company when the man died, went from the insurance company to the Pennsylvania Company and held there instead of being turned over as represented to the investor, that the beneficiary would get the check upon the death of the insured. The check went to the Pennsylvania Company to be retained by them and was not sent to the insured.

Mr. Irwin: And paid up the premium for his shares.

The Court: Frankly, that is what my understanding of it was.

Mr. Shapiro: That was not my understanding of what was represented. What was represented to these people was when the man died, the insured died, the beneficiary got the check.

By Mr. Shapiro:

Q. What else was in the kit, if you recall?

A. In the kit was a specimen of Independence Trust Shares, was a copy how the shares were made.

[fol. 228] Q. How what?

A. How the market everyday, how the portfolio was made.

Q. That is, of the forty-two shares?

A. No, these were for the six shares. Then there were testimonials that they bought contracts; then there were some charts showing how the money was used; then there were computations how our plan was better than an insurance company and better than a savings bank. There were comparisons that Capital Savings Plan is better than these things, and then there was a comparison from the Investors' Syndicate, that was another form of investment trust that we had quite a competition from. There was a comparison, a balance sheet, and assets to compare how they were better than they were. There was a table there of valuations, how the plan matures in so many years, and so on.

Mr. Shapiro: I ask that this paper be marked for identification Plaintiffs' Exhibit 46.

(A copy of tables in sales kit was marked Plaintiffs' Exhibit 46 for Identification.)

By Mr. Shapiro:

Q. Tell the Court what this paper, Exhibit 46, marked for identification is.

Mr. Irwin: If your Honor please, I think the exhibit speaks for itself, and we don't need the characterization of the witness.

Mr. Shapiro: Let me finish the question.

By Mr. Shapiro:

Q. Is that the copy of the tables that was in the kit?

A. Yes.

Q. And just what the plan is worth at the end of ten years, nineteen hundred and some odd dollars?

[fol. 229] Mr. Irwin: If your Honor please, I object to that question. The exhibit speaks for itself, and not Mr. Shapiro.

Mr. Shapiro: All right, I will offer this paper in evidence, and I call your Honor's attention to the fact—

Mr. Irwin: If your Honor please, I object to Mr. Shapiro—

Mr. Shapiro: I offer it in evidence and hand it to the Court. I ask your Honor to look at the valuation at the end of three years, and ten, so that you may follow the exhibit as it develops.

By Mr. Shapiro:

Q. Can't you remember anything else that was in that kit?

A. Yes, there were several talks, tell you what money can do, and all that talk, you know.

Q. When you went out to sell the people tell me what you told them with respect to the plan, its maturity, its safety, the insurance, and their ability to get their money back.

Mr. Irwin: If your Honor please, I object to that question. The witness has already testified to that. I object to it as leading because he has called this man's attention to certain things that he wants to emphasize, and he also testified he had no contract with our company.

The Court: I have already ruled on that phase of it. It is a leading question, Mr. Shapiro.

Mr. Shapiro: I don't think every question which directs a witness's attention to a subject matter is leading, not by any means. What I am doing is confining this witness—

The Court: I think you are trying to save time.

[fol. 230] Mr. Shapiro: Yes, and confine him in his testimony. If they don't want that, I will withdraw the question and ask the witness to tell us all his conversation with the investors about the plan.

The Witness: I couldn't talk to the investor what was in that plan; I couldn't explain the plan because we didn't know ourselves what was in the plan.

By Mr. Shapiro:

Q. What did you tell the investor?

A. If you want to make \$2000, save your money with the Pennsylvania Company, all right, put your money here, and when the company invests that money, then they give you a return of \$2000, and I have one here in my pocket to show them how the Pennsylvania Company invests their money outside. Your money is invested—

Mr. Irwin: Is that C-3?

The Witness: No, it is not C-3. We had five or six of those.

By Mr. Shapiro:

Q. Won't you listen to me and answer the question? I don't care what you could or could not do. What I want you to tell the Court is what you told these people about this plan, all that you told them.

A. Anything that could be told.

Q. Won't you answer the question and tell us what you told them?

A. I told them they could make some money by putting ten dollars in the Pennsylvania Company.

By the Court:

Q. What do you mean, putting ten dollars?

A. A month.

Q. How many years?

A. For ten years, that would be the limit.

Q. At the end of ten years what would happen?

A. \$2000.

Q. They would get \$2000?

[fol. 231] A. They would get \$2000. I showed them the prospectus and showed how it would mature.

Q. Did you tell them anything else?

A. I told them if they die they could get the insurance, and tell them everything that we could tell them in trying to induce them to take the stock.

Q. We want to know some of the things that you told them to induce them to purchase. With respect to the insurance did you tell them the money would go to them, that the proceeds of the policy would go to their beneficiary?

A. To their beneficiary, that was understood, of course.

By Mr. Shapiro:

Q. Now, talk about what we are asking you to tell us. Without putting things in your mouth, tell us what you told the man in order to sell him the contract. I am not interested if you told him you liked his looks, but something in connection with this plan. What did you tell them? You tried to sell them the contract, didn't you?

A. Yes, sir.

Q. What did you tell them?

A. The Pennsylvania Company will invest your money, and the Pennsylvania Company can get a better return for you than what the savings bank can give you, or better than if you put it in life insurance.

Q. Did you talk with the officers of the company and afterwards with the investors in the company when the money could be returned, and how?

Mr. Irwin: If your Honor please, I object.

The Witness: I did.

Mr. Irwin: I object to that as leading.

The Court: I am going to overrule your objection. With a witness of this type it is almost impossible to ascertain the facts unless there is some questioning. A leading question strictly construed is a question which defines the answer, gives the answer. I don't think that a question of [fol. 232] that type gives the answer. Of course, I will have to rule on each and every question. Repeat the question.

Mr. Shapiro: I will strike it out and put it this way.

By Mr. Shapiro:

Q. Did you talk to the man to whom you were trying to sell this contract about the question of insurance?

A. Yes, sir.

Q. Will you tell us what your discussion with him was about that?

A. I was telling the man that in case he died he puts in

\$10, start the payment, in case he died, at once his estate gets \$1200.

Q. That is on the \$5 payment?

A. \$10 payment.

Q. Did you talk with him about the circumstances under which, or the time when he could withdraw his money?

A. Yes.

Q. What did you say to him about it, and what was the discussion?

A. We told him there would be a charge of \$60 and at the end of the third year he can take his full money out, and to show him this chart that we have now.

Q. What was the full money?

A. \$360, according to the chart he would get \$375 at the end of the third year.

Q. When you sold these certificates or these contracts, to the investor, did you discuss with him anything about, first of all, charges by the company against his money?

A. Yes, we were telling him that the company was taking a fee of \$60.

By the Court:

Q. Which company?

A. Capital Savings Plan, and also the Pennsylvania Company was getting twenty-five cents a month for Trustee charges.

[fol. 233] By Mr. Shapiro:

Q. For what?

A. Trustee charges.

Q. Any other charges you told them about?

A. No.

Q. Did anybody in the company, any of the officers or the persons with whom you say you discussed this contract—did they tell you of any other charges?

A. They did and they did not. They always when we asked any question about the other charges, they said it is a complicated matter, and we don't know, ourselves, what it is all about.

Q. They told you their other charges, but they didn't tell you what they were about?

A. They couldn't understand these things.

Q. Did you ever explain to these investors any other charges?

A. I couldn't tell them that; there were \$200 altogether.

Q. What?

A. The charges were \$200; I couldn't tell them that.

Q. Did you know it?

A. Of course.

Q. You didn't tell them?

A. No, sir; I couldn't make any money.

Q. How did you figure out the \$200 charge?

A. There were 9 per cent. overwriting in making the portfolio.

By the Court:

Q. To whom?

A. To the Independence Trust Shares Corporation, which was owned outright by Capital Savings Plan. We have about six companies, we have Capital Savings, Independence of Delaware, Independence of Pennsylvania, Capital Savings Plan Distributor, they have another Capital Savings Plan Distributor, Independence Trust Shares and Independence Trust Shares Purchase Plan; it is a trust upon a trust upon a trust, see? If his Honor allows me—

[fol. 234] By Mr. Shapiro:

Q. We don't want any speeches. What other charges were there?

A. There were the compound—they call them in the new sales points, they called the compound reinvestment.

Q. What is that?

A. That is taking stocks out and liquidating them, and buying more, and liquidating them out, and liquidating them again, and making commissions over and over again like compound interest.

Q. You mean there was a charge every time they made an investment or repurchase of shares?

A. Yes, 9 per cent. every time, now 7½ per cent.; it is 4 per cent. 9½ per cent., 2½ per cent., 1½ per cent., and the Pennsylvania Company wants to get more—

Q. Tell me about those charges that you just recited. You said 2½ per cent. and 4 per cent.

A. First of all is 9 per cent. for making the shares, write-up. Then after they decide to sell a few shares out of the portfolio they take that money to reinvest for the benefit of the contract holders. Then they make again another

9 per cent. Then the portfolio had shares of stock. If they were selling from a list out of this again, they were invested again, they were making another commission. You see, in other words, they were taking a commission not once, but every time they were buying and selling. That was 9 per cent.

Mr. Shapiro: Cross-examine.

Mr. Irwin: Will your Honor indulge me by having a five-minute recess?

The Court: Certainly.

(Recess at twelve o'clock noon.)

[fol. 235] COSME BALANOS, resumed.

Cross-examination.

By Mr. Irwin:

Q. Mr. Balanos, you mentioned in the course of your direct examination that somebody testified in a divorce proceeding. Your wife has instituted a divorce proceeding against you, has she not?

A. Yes, sir.

Q. And you are contesting that proceeding?

Mr. Shapiro: Objected to.

The Court: Objection sustained. I struck it out on direct examination.

Mr. Irwin: If your Honor please, if I recall correctly there was no striking out of the testimony as to this.

The Court: I will rule on it now. It is immaterial as to whether he is suing his wife or not. If they are not living together you may bring that out to show there may be possibly some feeling.

Mr. Irwin: If your Honor please, it is also—

The Court: It is so immaterial—

Mr. Irwin: Will you hear me a moment?

The Court: Just a moment. It is so immaterial to my mind that I will overrule Mr. Shapiro's objection and let you proceed.

By Mr. Irwin:

Q. Your wife brought a divorce proceeding against you, didn't she?

A. Yes, sir.

Q. And you are contesting it?

A. Yes, sir.

Q. How long have you been living apart?

[fol. 236] A. Two years and four months.

Q. Two years and four months?

A. Yes, sir.

Q. You have not been living together since December, 1937, is that right?

A. 1936.

Q. December of 1936?

A. 26 of December, 1936.

Q. 1936; you haven't seen your wife or lived with her since that time?

A. Yes, I did, with my wife; we had an agreement about the divorce and she went back on the agreement. It was a big story. Mr. McCown is connected with this case—

The Court: Now—

Mr. Shapiro: That is what I have tried to avoid.

The Witness: I can tell them what has happened. I saw the libel, the salesmen of the agency had their names there and accused me.

Mr. Shapiro: Suppose you sit down.

By Mr. Irwin:

Q. When did you first learn of this suit?

A. I saw it in the paper.

Q. You saw it in the paper on Sunday, March 12?

A. That is correct.

Q. And what did you do on Monday? Go to Mr. Shapiro's office?

Mr. Shapiro: Let him answer.

The Witness: On Monday I went to Mr. Shapiro's office and I put my claim in.

By Mr. Irwin:

Q. You took your claim in. Whom did you see there?

A. I saw the—

Q. Was Mr. Rudenko there?

[fol. 237] Mr. Shapiro: Let him answer.

Mr. Irwin: This is cross-examination, if your Honor please.

The Court: You are both wasting time.

Mr. Irwin: If your Honor please, this is cross-examination, and I ask Mr. Shapiro not to interfere.

The Witness: I saw the Senator personally, Mr. Irwin,

By Mr. Irwin:

Q. Did you talk with Mr. Rudenko?

A. Afterwards we talked to all of them; yes, sir.

Q. Did you talk to Mr. Barkan?

A. Yes.

Q. How many times have you been in the office since you saw this in the newspaper?

A. Oh, maybe about three times.

Q. About three times. Now, were you in the Pennsylvania Company, or in the building at Fifteenth and Chestnut Streets after this suit was started telling people not to put their money in?

A. No, I was there to see my friend, and I saw him.

Q. Mr. Cooper?

A. Yes, I was at Mr. Cooper's desk.

Q. Is this Mr. Cooper?

A. That is Mr. Cooper.

Mr. Irwin: Stand up, Mr. Cooper.

(A gentleman stood up in the courtroom.)

By Mr. Irwin:

Q. Was it he you saw that day?

A. Yes.

Q. Did you go into him and say to him there is a receivership for the Independence Shares Corporation, and I have the bill?

[fol. 238] A. No, they are applying for a receivership.

Q. And you went in to tell that to Mr. Cooper?

A. Yes, because I had previously talked with Mr. Cooper about my money. I wrote to the Pennsylvania Company to come down to my lawyer. They saw the people with whom I had a contract. They made their complaints. Mr. Whetstone was in front, and Mr. Geary said, "You signed these papers, boys; you can't do nothing."

If you want to know the whole story, it is a story, and I can tell you. Mr. Whetstone came in the office in Media, and he saw the people to whom I sold, because I got a bad spot, because they told me not to tell the charges to the

people when I sold those contracts. I am in jail today because they didn't want me to come here and testify. I can explain to you, if someone wishes to know the particulars about this case—

Mr. Shapiro: Just answer the questions.

By Mr. Irwin:

Q. You are in jail at the present time because your wife had you arrested, and because you failed to pay the costs in the divorce proceedings that were charged against you, is that correct?

A. No, it is because they didn't want me to come here and testify, because I am on the relief, and they stole everything away from me.

Q. Isn't it a fact that the proceedings against you now are by reason of the fact that your wife, Mrs. Balanos, had you arrested because you failed to pay the costs that were charged against you in the divorce proceedings? Have you paid the costs that the Master has assessed against you?

The Court: How long are we going on with this?

Mr. Shapiro: I am not going to object to it at all—

The Witness: No.

Mr. Shapiro: —if this gentleman wants to ask those questions.

[fol. 239] The Court: I am not interested in the private lives of the witnesses and parties in this case.

By Mr. Irwin:

Q. Do you know Mr. Nelson?

A. Very well.

Q. Mr. Nelson is in the real estate business in Ardmore?

A. Yes, sir.

Q. How often have you been in his office in the last few weeks?

A. Every day; I stop every day.

Q. And you have told him that you were going to put this company out of business?

A. Unless I get my money.

Q. Yes, you have told him you were going to put this company out of business?

A. Yes, sir; I have a claim against that company of \$6,000. They put me before the Federal authorities, the

Postal authorities. They sent my letters addressed to the company to the Federal authorities, and Mr. Leonard, the inspector of the post office, examined me, and he says, "My boy," he says, "I know all about it."

It was me that brought the investigator here from Harrisburg. What did they do? Nothing. I caught the investigator in my wife's apartment at 12:00 o'clock at night drinking.

The Court: How much of this do you want.

Mr. Irwin: If your Honor please, it indicates this man has a bias, a hatred—

The Witness: I have a claim.

Mr. Shapiro: Yes, I want your Honor to consider his own interest in this case.

The Witness: I have life insurance to show I was employed as an employee of the company.

[fol. 240] Mr. Irwin: Please. If your Honor please, I ask that be stricken out.

The Court: I won't strike it out.

The Witness: I have been connected with this case eight years. I lost my home.

The Court: Just compose yourself, Mr. Balanos. This is not a shouting contest here. Won't you examine him on things that are material?

The Witness: Your Honor, you can see this—

The Court: No.

Mr. Shapiro: Put that in your pocket—let us have it, we will take charge of it.

By Mr. Irwin:

Q. Do you know Mr. Frank Irete?

A. I know Mr. Frank Irete.

Q. From Devon?

A. Yes.

Mr. Irwin: Is Mr. Irete here? Will you stand up, Mr. Irete?

By Mr. Irwin:

Q. Mr. Irete conducts a drug store in Devon, doesn't he?

A. Yes.

Q. And his wife is an agent of Capital Savings Plan and Independence Shares Plan?

A. Not when I was manager of it, no; it must be since my agency. As a matter of fact, in that bill of particulars you will see his wife's name, too, that I interfered with their sales for 1937. The way the company instructed is the way I sold them.

Q. Have you been in Mr. Irete's place within the last two or three weeks since this bill was filed?

A. Yes, sir.

[fol. 241] Q. Have you told him in his place you were going to put this company out of business?

A. I told him to take care of his wife, to be careful what was going on, because maybe the Justice Department will come after this case. I don't know what might come in this case, what would be the end.

Q. You know Mrs. Fairweather, don't you?

A. Very well.

Q. She was a friend of your wife and yourself?

A. Both of us, yes, sir, I sold her a plan, and I explained in the letter exactly the whole workings of the thing, because in the proceedings of my divorce they think that she is going to make a charge against me by saying I sold her the plan, but I was employed by Mr. McCown, because she was working for the company three months before she could get a license. Mrs. Fairweather admitted I sold her the plan, thinking she was going to make things very bad against me, and she changed her testimony saying two years, so I wrote a letter—

The Court: Now, you are just wasting the money of the parties to this suit by having this matter incorporated in the record.

By Mr. Irwin:

Q. Did you ever write a letter to Mrs. Fairweather?

A. Yes, sir, and explained the whole workings of the plan. I am here in the United States for twenty-five years. I never left Philadelphia. I never been away from Philadelphia and surroundings, and I have nothing against my record. I want to clear my position with these people that I unfortunately take some money under false pretense by instruction from men getting \$23,000 salary. My wife sells now. There are plumbers, bankers and real estate men.

Q. Do you have a plan now?

A. I have different plans and lost money.

Q. I say do you have a plan now?

A. I drew my plans out, and here is—

Q. I asked you if you have a plan now?

[fol. 242] A. Under the conditions that the Securities and Exchange Commission places on the company, I demanded from the company full price I pay for my plans. Here is my price. They are insolvent to the extent of over a million dollars, and I can prove to you how they are doing that. Do you want to see this?

Mr. Shapiro: Yes, I want to see them.

The Witness: I can explain the plan to you better than themselves; I studied it for eight years.

The Court: We haven't yet on the record is this man a planholder, and what kind of a plan? Give us some of the relevant things we ought to know about.

The Witness: There is a date the third of April, both of them; one 1935 and the other 1936.

#### Redirect examination.

By Mr. Shapiro:

Q. You have two plans?

A. Yes.

Q. This certificate, No. A-7215, is a ten dollar plan and the other number is A-10062, a ten dollar plan. They speak for themselves, and I will offer them in evidence and ask that they be marked 47 and 48.

Mr. Irwin: If your Honor please, that is a little out of order—

Mr. Shapiro: Not necessarily, it is still my case.

Mr. Irwin: —for Mr. Shapiro to offer them in evidence.

(Notice of payment due to the Pennsylvania Company, Trustee, to Mr. Cosme Balanos, on Certificate No. A-7215, was marked Plaintiffs' Exhibit 47.)

(Notice of payment due to the Pennsylvania Company, Trustee, to Mr. Cosme Balanos, on Certificate No. A-10062 was marked Plaintiff's Exhibit 48.)

[fol. 243] The Court: It was my intention to ask a question of this witness, inasmuch as this was not covered in the direct examination.

By the Court:

- Q. When did you first subscribe to the plan?
- A. April 3, 1935.
- Q. And that was a Capital Savings Plan?
- A. Capital Savings Plan, sir.
- Q. And that was ten dollars?
- A. Ten dollars, with insurance.
- Q. How long did you pay on it?
- A. I paid—as a matter of fact, I didn't pay. The company was paying for that, charged to my account; I had a drawing account.
- Q. Until what time was it paid?
- A. It was paid up to and including December, 1936.
- Q. 1936?
- A. The other plan—
- Q. Had any of that money been returned to you?
- A. About \$130. I lost \$80.
- Q. \$210 paid in, and you recovered \$130?
- A. Yes.
- Q. What about the other subscription?
- A. The other subscription was April 3, 1936, paid up nine months. That has a value of \$20.
- Q. Was that a five or a ten dollar plan?
- A. That was ten dollars with insurance.
- Q. And you paid in?
- A. I paid in \$90.
- Q. You received how much?
- A. Nothing. They said it had a value of \$20. I sold that plan to somebody else and got \$40.

Recross-examination.

By Mr. Irwin:

- Q. You sold your plans?
- A. Yes. I had to pay them, it was compulsory for the salesmen of the company. My wife didn't buy any plan.
- [fol. 244] Q. Did your wife have a plan?
- A. No. It was compulsory for everybody to have a plan. The vice-president was getting \$23,000. This is the biggest swindle that ever existed in the United States.

The Court: Strike the remark from the record.

Mr. Shapiro: Yes, I ask it be stricken. Don't call names.

The Witness: No, I don't call anybody names. My education don't allow me to call anybody names; let them call me names.

The Court: Anything else?

Mr. Irwin: No further questions.

By the Court:

Q. I would like to ask one question. You spoke of a \$200 charge made, didn't you? You said the total charge for the company amounted to \$200?

A. Yes.

Q. Were you referring to the ten dollars plan?

A. Yes.

Q. Did you mean by that, that against every \$1200 paid in over a ten-year period there would be a charge or charges totalling \$200?

A. No, your Honor; the total charge for the ten dollars a month plan without insurance is \$189.60.

Q. How do you arrive at that figure?

A. I arrive in this way; it is \$60 for the Capital Savings Plan; it is \$3 for the Trustee; then there is 9 per cent. on the \$1140.

Q. You included in that \$200 charge just the one 9 per cent. charge?

A. Yes.

Q. You spoke before of resale.

A. That doesn't include that. Another thing, with the insurance is about \$57, if you have insurance.

[fol. 245] Q. That wouldn't be a charge which would accrue to the company, itself; that money went to the insurance company?

A. Yes, sir, insurance plan.

By Mr. Shapiro:

Q. That was deducted from the payments?

A. Yes.

The Court: I know, but he spoke of a \$200 charge which accrued to the company, and the reason for my questions was that I didn't know whether in that \$200 he calculated more than one charge of 9 per cent., and I intended to ask this witness as to how he knows, and from what information he could give it to us, and about the 9 per cent overwriting

charge on reinvestments, but he says he knows of no such charge. That is all.

Mr. Shapiro: I would like Mr. Geary to come back for just a question or two.

ALFRED H. GEARY, recalled.

Cross-examination (Continued).

By Mr. Shapiro:

Q. Without going into the contents of any or all of these papers, I would like to ask whether it is not true, and you know as a fact that there was considerable publicity given the proceedings, the Federal Securities Commission proceedings which were instituted against this company and which have been referred to here in this testimony.

A. There was.

Q. And that publicity took the form of accounts of the proceedings in the newspapers?

A. That is correct.

By the Court:

Q. As I understand it, your capitalization is \$111,800, and you have 1058 shares outstanding?

A. Sixty shares were repurchased for the treasury, your Honor.

[fol. 246] Mr. Irwin: If your Honor please, that is just a list of stockholders and the number of shares now, and the question was as to how much was paid originally.

By the Court:

Q. The issued stock is \$105,800?

A. That's right.

Q. Not \$111,800?

A. That's right.

By Mr. Shapiro:

Q. When the company insured its employees under a group insurance plan were the policies of insurance sent to the company and then distributed by the company to its employees?

A. I don't recall the procedure.

Q. Of course, that was a plan to insure your employees?

A. Employees and salesmen.

Q. I show you a policy of insurance with the Connecticut General Life; it certifies that it insured certain employees of Capital Savings Plan, Inc., made out to Cosme Balanos, an employee, in the sum of \$1000, making his wife, Jane T. Balanos, beneficiary. I suppose you are familiar with that?

Mr. Irwin: Where is the employee there?

Mr. Shapiro: I read it from the policy.

By Mr. Shapiro:

Q. Is that right?

A. Yes.

Mr. Shapiro: I offer that in evidence and ask that it be given a consecutive exhibit number following the stockholders list.

(A policy of Connecticut General Life Insurance Company certificate No. 165, to Cosme Balanos was marked Plaintiffs' Exhibit 77.)

[fol. 247] Mr. Shapiro: Now, if your Honor please, I ask that we be furnished with the record information we requested this morning.

Mr. Bohlen: If your Honor please, I called the officer of the Pennsylvania Company that handled these matters. I found there are three trust agreements under which Capital Savings Plan certificates are issued. The one under which all of the testimony that I have heard is related to is the agreement of May 1, 1934. There were two prior ones.

Under an agreement in December, 1931, we have for investment approximately \$2800, and no money for distribution. Under an agreement of 1932, August 9, 1932, we have approximately \$71,000 for investment, and \$1600 for distribution.

The Court: Give me the figures again, please.

Mr. Bohlen: The agreement of December, 1931—

The Court: \$71,000?

Mr. Bohlen: The first item is \$2800 for investment, nothing for distribution; the second agreement, of 1932, \$71,000 for investment and \$1600 for distribution. Under the agreement of May 1, 1934, we have \$473,000, approximately, for

reinvestment, and \$29,400 for distribution. That makes a total under the three agreements in which the seven and a half per cent—I call it load; what is it?

Mr. Shapiro: Mark-up.

Mr. Bohlen: Of \$546,800 for investment.

The Court: \$546,000.

Mr. Bohlen: And \$800 for investment, and \$31 for distribution. Under the Independence Purchase Plans there is \$7700 for investment and \$900 for distribution. As to that, there is a 4 per cent deduction before the money is invested.

[fol. 248] The Court: That is the \$7700?

Mr. Bohlen: Yes. Now, also, I don't know whether it is brought out in the testimony, but funds for distribution include the normal income. As I understand the distribution is forty cent a share, of which three cents represents income and thirty-seven cents represents the capital. These also are approximate figures; these are approximate figures because I can't give you the actual dollars and cents for the reason as certificate holders come in and withdraw we have to withhold moneys which might otherwise be invested.

The Court: That totals \$585,000, and \$662,000 represented the proceeds from the sale. Where is the difference?

Mr. Shapiro: What happened to the difference?

The Court: That is what I am asking.

Mr. Shapiro: That is \$80,000, isn't it?

Mr. Bohlen: There are other holders of Independence Trust Shares. There are shares held by the public, and also shares which are purchased for—

The Court: I am afraid I don't understand what you mean when you say shares held.

Mr. Bohlen: Well, Independence Trust Shares, as Mr. Geary testified, was organized in 1930. They didn't start the plans until 1931. He testified that those shares were distributed through dealers.

The Court: In other words, the Pennsylvania Company is not the Trustee as to the balance of that fund?

Mr. Bohlen: They are the Trustee of the investment trust.

The Court: I say there are some \$80,000 you are not investing.

[fol. 249] Mr. Bohlen: That's right. We are also Trustee, you will remember, for Income Foundation and National Plan.

The Court: I took \$662,000 as relating to Independence Shares Corporation.

Mr. Bohlen: Yes.

The Court: And its plans.

Mr. Bohlen: No, there are also, as I say, members of the public who hold Independence Trust Shares; there are the shares that the Pennsylvania Company holds under the plans of Income Foundation and National Plan.

Mr. Shapiro: What did you do with the other \$80,000?

Mr. Irwin: If your Honor please, I think I can clear up your Honor's mind on that thing. You see, all the underlying stocks—I mean these seven underlying stocks back of the Independence Trust Shares have been sold. The \$662,000 represents all the proceeds of the sale of all those underlying shares. Against those were issued Independence Trust Shares, but the Independence Trust Shares, which are in our plans or have any connection with Capital Savings, or Independence Shares Corporation are in the figures included by Mr. Bohlen.

The Court: What you mean, as I take it, then, is that involves or relates to the certificates issued by Independence Trust Shares.

Mr. Irwin: No; other plans were fully paid on partial payment plans which Capital Savings Plan, Inc., or Independence Shares Corporation have issued.

Mr. Bohlen: I think I can answer Senator Shapiro's question. The remaining \$80,000 is to be distributed to the [fol. 250] holders of Independence Trust Shares that were not involved in our immediate situation.

The Court: How much is there?

Mr. Bohlen: Well, now, I would have to know the amount—we have had testimony only as to the amount that was realized from the sale of the seven underlying stocks. There is also a distribution of income.

The Court: What will be done with the \$80,000?

Mr. Bohlen: It will go to whoever is the holder of the Trust Shares.

Mr. Shapiro: You mean that is what you are going to do with it, what the Pennsylvania Company is going to do with it?

Mr. Bohlen: We are sending it out to the holders of the trust, yes.

Mr. Shapiro: How much of the \$80,000 are you going to send out to the holders of trust shares?

Mr. Bohlen: I can't answer that.

Mr. Shapiro: You divided it into groups. Who is getting this money? There is a difference of \$80,000 and you can't tell us who will get the \$80,000.

Mr. Bohlen: I am telling his Honor we are paying the money to the holders of Independence Trust Shares entitled to the distribution.

Mr. Shapiro: Aren't these people holders of record?

Mr. Bohlen: No, they are not.

Mr. Shapiro: Then there is another group. How much do they participate in the \$80,000? Some of it certainly comes off as charges. The Pennsylvania Company is getting some of it, aren't they? How much of the \$662,000 goes to the Pennsylvania Company?

[fol. 251] Mr. Bohlen: I can't answer your question right now.

Mr. Irwin: If your Honor please, I think—

The Court: You have been speaking about \$80,000; it is \$77,000.

Mr. Irwin: If Mr. Shapiro wants that testimony he can bring somebody down here from the Pennsylvania Company. I don't think he should put it up to Mr. Bohlen and charge him with it.

Mr. Shapiro: We understand Mr. Bohlen would bring the figures. I don't criticize him for it.

Mr. Bohlen: I have the figures which relate to the reinvestment of funds for the holders of these plans before your Honor which involve the additional charge of 7½ per cent and the deduction of 4 per cent, and that, as I saw it, was the principal matter before your Honor. It was the matter in which your Honor wanted to know how much money was involved.

The Court: Well, I didn't know of the existence of any other kind—I don't know what to call them, beneficiaries.

Mr. Shapiro: You mean there is 7½ per cent being charged, on how much?

Mr. Bohlen: On \$546,800.

The Court: I think I know what is in the picture, but I hesitate to say so; I may be in error.

Mr. Shapiro: I understand from Mr. Balanos there is a 2½ per cent charge made on \$546,000.

Mr. Bohlen: No, not quite that. The shares were bought at \$546,000, which will be bought in a price which will include a mark-up of 7½ per cent.

The Court: You both mean the same thing.

[fol. 252] Mr. Bohlen: The fraction is different.

Mr. Shapiro: Let's see the mechanics of that. For instance, you say you have \$546,000 to reinvest?

Mr. Bohlen: Yes.

Mr. Shapiro: Will \$546,800 be reinvested, or will \$546,000 less 6 per cent?

Mr. Bohlen: The amount which will be invested will be \$546,800, approximately. These are approximate figures. They will be invested at a price which will include a mark-up of 7½ per cent.

Mr. Shapiro: The investors will have to send a check to pay another 7½ per cent.

Mr. Bohlen: Oh, no.

The Court: What he means is this, this \$546,000 purchase covers the 7½ per cent mark-up. They actually pay this money, I understand, to Independent Shares Corporation.

Mr. Shapiro: That is what I want to know. They pay the 7½ per cent to them.

The Court: Yes.

Mr. Shapiro: That is what I want to find out.

The Court: They buy the stock from Independence Shares Corporation at a mark-up of 7½ per cent of the cost price to the Independence Shares Corporation, isn't that correct?

Mr. Bohlen: Yes, Independence Shares get 7½ per cent only—

The Court: It cost them 530 odd thousand, or 520, whatever it may be; you have to make the calculation.

Mr. Bohlen: We talked about the difference on the mark-up and the deduction. I understand 7½ per cent equals about 6.8 on the deduction.

[fol. 253] Mr. Shapiro: That is after there has been approximately 2½ per cent taken off for the Pennsylvania Company, too. It is close to that.

Mr. Bohlen: Your Honor—

The Court: In other words, this is about \$38,000 more than the stock cost the Independence Shares Corporation.

Mr. Shapiro: On that amount, alone.

The Court: Yes, on \$546,000; it is roughly a 7 per cent mark-up.

Mr. Shapiro: Mr. Geary, I want to ask a question just to understand this. Will you come up a minute, please, and then I am through.

**ALFRED H. GEARY, recalled.**

**Cross-examination (Continued).**

**By Mr. Shapiro:**

**Q.** There are approximately 20,000 investors, we will call them, or certificate holders, whatever they are.

**A.** I think so.

**Q.** How many have been sold, approximately, from the time — the Securities Commission hearings up until the present time?

**A.** I don't know.

**Q.** Do they run into money?

**A.** Well, you saw the figures, they give you a rough idea.

**Q.** I didn't see the figures.

**A.** Mr. Bohlen just presented them.

**Q.** Are these the figures which show it?

**A.** Yes.

Mr. Shapiro: Where is it, Mr. Bohlen?

[fol. 254] Mr. Irwin: That would show what these people are entitled to.

Mr. Shapiro: Let's not confuse it.

**By Mr. Shapiro:**

**Q.** What is there on these figures of Mr. Bohlen which indicates it?

**A.** Down here (indicating).

**Q.** In other words, the full amount —

**A.** Of course, they have only had a few months to pay in.

**Q.** The total of sales, then, or purchases since the Securities Commission hearings is \$7700?

Mr. Irwin: Not sales; amount paid in.

Mr. Shapiro: That is what I mean.

**By Mr. Shapiro:**

**Q.** That is \$7700, and you have had how many months?

The Court: That is not right; \$7700 plus some \$8500 or \$8600, which represents holdings sold. There must be \$7700 for reinvestment and ninety-nine paid out in cash. They had forty-two stocks and only sold seven.

Mr. Bohlen: We don't arrive at it that way.

The Court: I don't know what the ratio would be.

Mr. Shapiro: It compares with the \$73,000, the percentage of sales.

Mr. Irwin: If your Honor please, I think—

Mr. Shapiro: You don't have to have any books here to follow that.

Mr. Irwin: Wait a moment, Mr. Shapiro. If you want that I will have Mr. Bonner put on, and go into it.

[fol. 255] The Court: You won't do it today.

Mr. Geary: Have we a record here?

The Court: Is there somebody who can tell me how many have been sold since June 23, 1938?

Mr. Bonner: I think approximately 600.

The Court: And there are 20,000 holders.

Mr. Shapiro: That's right. I say this is a responsibility that now rests on the Court, not on me. I have shown here there are about \$550,000 which is going to be disbursed, and that it is going to be disbursed and create a preference, and it is going to be disbursed and cause a charge of some thirty-eight or forty thousand dollars, which I don't believe these people have a right to make against this fund, and if your Honor permits the distribution of that and the distribution of the thirty-eight or forty thousand dollars to this company, I don't know what will be the subsequent determination of this case, and I am sure it is going to create a preference, and I am asking your Honor to issue a restraining order in the matter.

The Court: The responsibility goes further. I am not taking judicial notice of the condition of the stock market in the last few weeks, but we do know there has been a severe decline. If this money among 20,000 plan holders' stock is put into their certificates—or investors, whatever you call them—on Tuesday as of the closing price of Monday they may be much better off if there is any rebound in market conditions than two or three weeks later, or a month, after the matter is disposed of. In the event a receivership is not granted, they will have to come in under a much higher price. That would be very profitable to Independence Shares Corporation at the benefit of the plan holders, inasmuch as the plan holders pay for their securities, in effect, at the pre-[fol. 256] vailing prices the day before it goes in the portfolio. Do you follow me?

Mr. Shapiro: Yes.

The Court: In other words, on Tuesday, the market being low, they will pay less for their securities. If the Independ-

enee Shares Company is held up a month or two and this bill is dismissed, these plan holders will have to pay for this stock at a considerably higher price, and they might make a tremendous profit that would be a loss to these 20,000 plan holders, in turn, whatever the number might be, for which I might be held not legally responsible but—

Mr. Shapiro: Let me answer you by saying that proposition can be very easily solved with two suggestions: The first one is so far as the purchase is concerned, we are not concerned about that. I take the view that is merely a turnover; and if they make it, it can't be anything to our detriment, if they buy it for less than they sell it.

I say the Pennsylvania Company should not be permitted to distribute any of this money to the Capital Investment Company or Independence Shares Company on this added price of 7½ per cent—

The Court: In other words, you are discussing what we will call in round figures \$35,000..

Mr. Shapiro: Yes, and the money they are distributing should be distributed in a cash distribution, because they may create a presumption—

The Court: That \$31,000?

Mr. Shapiro: That is correct. No harm can come to the person who is to get that. If he gets it, he gets it later.

The Court: Then you are in agreement with the Court's statement that they be permitted to reinvest this \$546,000.

[fol. 257] Mr. Shapiro: I say there is nothing you can do to stop them without causing more harm, or the possibility of more harm than good. I want the record to show I don't agree that that is the right thing to have done.

The Court: My position is we will not make an order to do it this time. My position is, and I think yours is, we don't care to interfere.

Mr. Shapiro: Without waiving my right to claim it should be done.

The Court: Because there might be irreparable injury. Frankly, if you did take that position I would require you to put up a bond.

Mr. Shapiro: I wouldn't ask it without putting up a bond. Since I can't be expected to put it up, I don't ask it.

The Court: The Court is advised that on Tuesday next, or Monday next the Pennsylvania Company, Trustee, proposes in accordance with the terms of these various trust agreements to invest or to purchase securities in the ag-

gregate of some \$546,800, and also make cash disbursements totalling some \$31,000.

Mr. Bohlen: \$32,319.

The Court: \$32,000. In addition to that, they propose to invest some \$7700 under the plan, under some subsequent plan, I don't know the date, but subsequent to May 1st, 1934, and to disburse from \$900.

There is no objection as to the investment of this \$546,800 and the \$7700. Is that correct?

Mr. Shapiro: I don't see how we can interfere with it.

The Court: I just want it on the record that no objection has been raised, I take it, by Mr. Shapiro against the dis-[fol. 258] bursement of \$32,000 in cash, and \$900 in cash; is that correct?

Mr. Shapiro: That is correct.

The Court: Making a total—I think that \$31,000 and \$900 makes \$32,000; that is a total disbursement of \$32,000 in cash, against a disbursement of some \$35,000 or \$36,000 which represents a 7½ per cent mark-up.

What do you have to say, first, as to the disbursement of \$32,000 in cash? How under the terms of your trust agreement would that affect the company? Would you be in violation of the terms of your trust if you didn't pay it out?

Mr. Bohlen: Yes, your Honor. With each application the so-called investor signs a trust to us to reinvest his distributions at the offered price. He also has a right at any time to instruct us to limit his distribution to it.

The Court: Have you received instructions for the remission of this \$32,000?

Mr. Bohlen: Yes, from the individual certificate holders.

The Court: Therefore, there would be a liability on the part of the company if you didn't pay it out.

Mr. Shapiro: Liability for what?

The Court: For failure to carry out the contract.

Mr. Shapiro: The only liability would be they owe the money.

Mr. Bohlen: Wait a minute. I can't see that any other contract certificate holder is harmed, because he has no interest in that.

The Court: That goes to a larger question involved, whether these are individual trusts so that each man stands on his own feet. I am just considering if any order which [fol. 259] the Court will make will cause any irreparable in-

jury to anyone which we could safeguard against if you were not to distribute this money to the people.

Of course, there is no danger that the position of the Pennsylvania Company will change within the next week or two weeks in the Court's mind, I am satisfied as to that. Therefore, there can't be any harm to those entitled to the money except there may be some of them inconvenienced.

Mr. Bohlen: Your Honor, my thought is there is absolutely no other contract certificate holder which is involved in what we distribute from the trust to any particular certificate holder, and also, as far as inconvenience is concerned, a number of contract certificate holders have written in and said in view of the size of this distribution that they could use the money, and would like to have it, and we are bound to pay it to them, and we might have the responsibility for interest. I can't see, your Honor, that any other contract certificate holder would be hurt.

Mr. Shapiro: Picone will be hurt who has this \$2400 he paid in cash, and \$25 a month. If they make an equitable distribution Picone will be hurt, and anybody else who wants to join in the principal.

Mr. Bohlen: If Picone wants to file with us before we invest the money written instructions to pay him his money, we will do it.

Mr. Shapiro: He is suing for the full amount of his money, and he is asking that these assets be protected.

The Court: Can't he get it without prejudice?

Mr. Bohlen: I think so, yes.

Mr. Shapiro: In the first place, how do I know he wants it? And he isn't the only one.

[fol. 260] Mr. Bohlen: If Mr. Picone files instructions with us he will get his money.

The Court: Gentlemen, I do have to go. I am only considering what effect the Court's order will have if an order is made. If it is just a question of some slight inconvenience, it is one thing; if it is a question of some people being seriously inconvenienced by the failure of the Trustee to carry out its obligations, or that the position of the Independence Shares Corporation or the position of the Pennsylvania Company will be seriously affected, that is another. I really don't think it will cause any harm. Are you through with all your testimony?

Mr. Shapiro: Yes, your Honor.

The Court: After the notes of testimony are received I certainly will dispose of this matter at the earliest possible date. In the event I don't dismiss the bill, of course, you are at liberty to go ahead. In the event I don't dismiss the bill the matter will go to a Special Master to consider the matter. That will involve further delay. That would mean in the Court's mind there is a necessity for postponement of any further act, or the carrying out of any further act which might be prejudicial to any of these plan holders. Do you make an application now, Mr. Shapiro?

Mr. Shapiro: I am making an application, for your Honor to enter an order directing the Pennsylvania Company not to pay out the funds which they were about to distribute to the people who are accepting their cash distribution and the 7½ per cent mark-up.

Mr. Irwin: Will your Honor hear me on that point, and the effect on the Independence Shares Corporation?

The Court: Certainly.

[fol. 261] Mr. Irwin: These people own Independence Trust Shares which they purchased. They have money coming to them; that money belongs to them. If your Honor would make an order preventing those plan holders from getting their money it would cause untold harm to our company because it would bring about a breach of the contract between the Pennsylvania Company and the Trustee whereby they wouldn't get the money.

The Court: \$30,000 or \$32,000 distributed among twenty thousand plan holders wouldn't so seriously inconvenience them, would it?

Mr. Irwin: If it was five hundred, if your Honor please, and if five hundred people would go around and say, "We can't get our money—".

The Court: You mean a hardship to the company, not to the plan holders.

Mr. Irwin: The hardship would be to our good will, to our good name, because of the fact that this thing was done. If your Honor please, I don't see what warrant there would be for making such an order, and it would do, and I urge upon your Honor that it would do us a lot of harm. It would harm the Pennsylvania Company, a banking institution.

Mr. Bohlen: May I request your Honor to defer this matter until Monday? The money won't be paid out until Monday. I would like to have an opportunity of setting

down on paper my reasons why this should not be done. I really think it is a serious situation.

Mr. Shapiro: I think upon the assurances of counsel that it won't be distributed, we are entitled to have the Court do it.

The Court: Let's get this straight for the record. There is no objection to the reinvestment or the investment of this \$546,800. We will not take any action with respect to the [fol. 262] cash distribution of \$32,000. The Court will direct that of the thirty-five or thirty-six thousand dollars that will be received by the Independence Shares Corporation—we will call it a mark-up for the sake of a better name—that there be no distribution of that fund by the Independence Shares Corporation in any way.

Mr. Shapiro: By the Pennsylvania Company.

The Court: Well, don't you see, they actually pay it over to them. I don't know how you can possibly segregate it.

Mr. Shapiro: The Pennsylvania Company has the money.

The Court: Do you divide it up?

Mr. Bohlen: No.

The Court: I don't want to impose any burden on the company that will make it impossible to carry out their obligations. In other words, do you carry on your books, we will say, ninety-two and a half cents for the stock and seven and a half cents for the company, or do you pay them one hundred cents?

Mr. Bohlen: We pay them one hundred cents.

The Court: And they divide it up?

Mr. Bohlen: Yes.

The Court: The Court is of the opinion there should not be any distribution of the thirty-five or thirty-six thousand dollars which represents this markup to the Independence Shares Corporation, so that you are sufficiently protected. That certainly cannot inconvenience anyone.

Mr. Irwin: If your Honor please, Mr. Geary has asked me to state to your Honor that in so far as this—whatever the [fol. 263] amount may be, your Honor has referred to it as approximately \$35,000, that we do not desire that money on Monday, and if we are not rightfully entitled to it we don't want it.

The Court: When I spoke of it I had in mind the possible difficulties of splitting it up.

Mr. Irwin: Whatever the amount is which is due us out of that, we will try to keep that segregated and keep that in the custody of the Pennsylvania Company until at least we consult with your Honor further.

Mr. Shapiro: I understand there will be no distribution outside of the purchase of the stock until your Honor acts on the matter on Monday.

Mr. Irwin: On Monday.

The Court: There is only one question left open, the distribution of the \$32,000 in cash. What is the status of this money now? Do you desire to offer any testimony at some other time?

Mr. Irwin: If your Honor please, I would like to advise your Honor on Monday about that after I have had a chance to think this over.

The Court: I will not be available on Tuesday, Wednesday or Thursday. If you want to offer testimony I will hear it on Monday morning.

(Discussion off the record.)

Mr. Irwin: I want to renew my motion to dismiss on the ground that no case has been made out.

The Court: That is understood.

Mr. Irwin: I have made it on the record.

The Court: You have a standing motion to dismiss. This hearing is continued to Monday morning at ten o'clock unless otherwise notified by counsel.

[fol. 264] D. K. PORTEOUS.

Cross-examination.

By Mr. Shapiro:

Q. When was the first time you gave the company advice?

A. What—while I was employed, Mr. Shapiro, on January, 1937, to supervise the portfolio and render investment advice—

By the Court:

Q. January, 1937?

A. Yes.

By Mr. Shapiro:

Q. Did you give them any advice in January to sell any stocks?

A. Definitely no.

Q. What do you mean by "definitely no"?

A. I am sorry.

Q. What did you mean by that?

A. No. I will retract that statement. I will just say "no."

Q. Did you give them advice at any other time in January as a result of which they sold securities?

A. No, sir.

Q. So that the first time you gave them any advice as a result of which they sold securities was this year in April?

The Court: February.

The Witness: February.

By Mr. Shapiro:

Q. What were you paid in 1937 for your services?

A. Annual retainership fee of \$2400 in 1937.

Q. What was it this year?

A. In 1938 it was \$2400. In 1939 \$2400. Now, Mr. Shapiro, that contract is on file with the S. E. C.

Q. That's all right, I am just trying to get some information. Is that the only compensation you get?

[fol. 265] A. That's the only compensation I get. I have no profit sharing clause.

Q. I didn't ask you whether you have any profit sharing clause, I asked you if you have any other—

A. I am trying to help you.

Q. Please don't.

The Court: Just answer the questions.

By Mr. Shapiro:

Q. Do you get any other compensation of any other kind from them of any form whatever?

A. No, sir.

Q. Any members—are there any other members of the firm except yourself?

A. Yes.

Q. Do—did any of the members of the firm get any compensation other than what you have told us about?

A. No.

Q. Did you look over their portfolio, did you examine the stocks and the kind of stocks that they had?

A. Continuously, yes.

Q. Were these stocks which you advised them to sell paying dividends?

A. Yes, all of them were paying dividends.

Q. Of course, I assume that, from what you said, you knew something about the nature of this trust arrangement. Did you or didn't you? Particularly, I am interested did you know that this stock, the stocks had to have an earning capacity, at least an increase in their value over a period in order to permit them to mature under the terms of this agreement?

Mr. Irwin: I object to the question.

The Court: Objection overruled and exception.

The Witness: What do you mean, Mr. Shapiro? Explain yourself a little bit better.

Mr. Shapiro: Read the question to him.

[fol. 266] (The question was repeated by the reporter as follows:

"Q. Of course, I assume that, from what you said, you knew something about the nature of this trust arrangement. Did you or didn't you? Particularly, I am interested did you know that this stock, the stocks had to have an earning capacity, at least an increase in their value over a period in order to permit them to mature under the terms of this agreement?"

By Mr. Shapiro:

Q. Do you follow that question?

A. Under the terms of the agreement, I don't know what you mean by "agreement."

Q. They sold investment contracts and at some period or other they had to mature for them to be a successful investment, the investors had to get a maturity value at some time or other, didn't they?

A. Mr. Shapiro, I know that the investors are participants in common stocks that are held by the Pennsylvania Company. As to any future value? I am not sure. I can't help you.

By the Court:

Q. You know the purpose of the purchase of the securities, of the trust certificates by the planholders, don't you?

A. The purpose for which the investment—

Q. Let me put it to you this way, they buy it and pay ten dollars a month—

Mr. Shapiro: If I may interrupt, it would be important to you to know whether this gentleman knew about it. I don't object to him being told.

By Mr. Shapiro:

Q. Did you know anything about the plan?

A. I don't hold a plan.

Q. Did you know anything about the plan that these people who employed you were selling? Did you know anything about that plan?

[fol. 267] A. Mr. Irwin—

Q. Won't you answer the question without Mr. Irwin?

Mr. Irwin: If your Honor please, I think it is due this witness to know what Mr. Shapiro is talking about. What plan is he talking about?

Mr. Shapiro: I object. If Mr. Irwin wants to object, I don't object to that, but I object to his speeches.

Mr. Irwin: I am stating my reasons for the objection.

The Court: We don't need a life line thrown to this witness. This witness testified under direct examination that he knew it was a limited trust arrangement. If he knew enough about it to give it a name, he knew about the purpose of the plan. Mr. Shapiro is asking him the extent of that knowledge.

Mr. Irwin: I think it is fair to point out that the underlying securities of Independence Trust Shares are entirely independent of the other plan.

Mr. Shapiro: I object to the statement from counsel.

The Court: I will sustain the objection and direct the witness to answer the question that was put to him by Mr. Shapiro.

The Witness: What was the question?

Mr. Shapiro: Read the question to him.

(The question was repeated by the reporter as follows:

"Q. Did you know anything about the plan that these

people who employed you were selling? Did you know anything about that plan?"

[fol. 268] The Witness: If Mr. Shapiro now refers to the plan of some witnesses that future values would be thus and so with a definite stated amount at some future date, I must say no.

By Mr. Shapiro:

Q. Who employed you? You are not answering my question.

Mr. Irwin: I object.

The Court: I will continue this hearing for two weeks unless we can proceed in an orderly fashion. I have ruled that the witness must answer the question.

Mr. Irwin: I object unless this witness be given a chance to answer the question and not be interrupted.

The Court: Your point is well taken on that ground, that he should be given opportunity to answer, but the witness is not making responsive answers. As I said before, in direct examination he said that he knew this was a limited trust arrangement. In order for him to arrive at the conclusion that this was a limited trust arrangement he must have known something about the arrangement. Mr. Shapiro is questioning him as to the extent of his knowledge. He ought to be able to answer it. If he doesn't know, he can say he doesn't know.

The Witness: No, I will say that insofar as my employment is concerned, I was employed by Independence Shares Corporation. I knew that this was a limited management trust in that when the securities were liquidated that no new security could be put in its place, that the proceeds of liquidation were distributed in the form of cash as a principal distribution, or, the proceeds, if the planholder or contract holder or holder of the certificates desired, the proceeds could be reinvested in the remaining stocks. Is that your question?

[fol. 269]. By Mr. Shapiro:

Q. Have you finished the answer?

A. Well, I don't know if I have finished the answer, but when the Judge states that I knew something of the plan, I want to elaborate as to what I knew of the plan and my

connection with it. I think that takes up all of my personal connection and employment.

Q. Are you through?

The Court: Apparently. Go ahead, ask your next question.

Mr. Shapiro: I don't want to be accused of interrupting him.

The Witness: Well, ask a question and see if I am through.

By Mr. Shapiro:

Q. Mr. Porteous, did you know what was to be done eventually with this stock after the money was reinvested? For instance, in this very case you advised the sale. There were proceeds. Some were distributed in cash and the balance reinvested. What was to eventually become of that, do you know?

A. Why, the balance would be reinvested in the remaining securities.

Q. Do you know for what purpose, for what eventual purpose?

A. Why, certainly, for the purpose of employment in these securities. Well, that is the answer.

Q. With what end in view? How long was this investment to go on, did you know. Did you know how long this investment and reinvestment was to go on in this limited number of securities? Did you know that?

A. Well, I knew that the investment was to be—when I was employed, Mr. Shapiro, there were forty-two stocks in the portfolio—

A. That is not answering my question.

[fol. 270] A. I am trying to get to the question. If we recommend the sale of seven stocks, and if seven stocks are eliminated, I know that those people who elect, instead of taking the principal cash themselves, to have the Pennsylvania Company direct reinvestment of the proceeds in other securities, it would mean thirty-five other securities would be in the vehicle for the principal distribution. Does that answer your question?

Q. Did you know what was the eventual purpose of reinvesting that in the remaining thirty-five securities insofar as the contract holder was concerned? What was the ultimate purpose?

A. That is the ultimate purpose.

Q. What was that?

A. The investment in thirty-five securities.

Q. To what end? For how long? Did you know?

A. I don't know.

Q. You didn't know?

A. No.

Q. Well, if you don't know, say so.

A. I would like—

Q. You don't know. Is that the answer? You didn't know? He shook his head "Yes." I would like the record to show that. Were you told what stocks to pick out for the sale when you were employed in February at first?

A. I would like to go back to that "No," I would like to go back and say yes, I knew that the proceeds would go into the thirty-five stocks.

Q. You have already said that.

A. All right.

Q. I am asking you the question whether you knew how long?

A. Nobody knows how long.

Q. Did you know how long that was to continue?

A. What?

Q. The reinvestment of the stock, or investment in these thirty-five shares.

[fol. 271] A. Nobody knows.

Q. Did you know?

A. No.

Q. All right. Were you told in February which stocks you should pick out for sale, or was that left to you to decide which stocks were to be sold?

A. Mr. Shapiro. I am employed as investment counsel, if you please, I am employed to give orders, I am employed to make my recommendation.

Q. Won't you answer my question?

A. I was not told which stocks to select.

Q. You did your own selecting?

A. The firm of Porteous and Company, Incorporated, did its own selecting.

Q. What were the dividends that were paid on the five stocks that were sold? What dividend did the Bankers Trust Company pay?

A. I would rather not make it oral, I would have to refer to the records.

Q. Go ahead.

A. There are 40,000 common stocks available. I can't recall—

The Court: Refresh your recollection.

By Mr. Shapiro:

Q. Refer to your records, on the Bankers Trust Company.

The Court: He said a moment ago that the Pennsylvania Company directed the reinvestment. Was that your understanding?

The Witness: Yes, those orders were given by the Pennsylvania Company upon advice from the Independence Shares Corporation to a brokerage firm to reinvest the proceeds. That is my understanding.

By Mr. Shapiro:

Q. I want to ask a question.

A. Two dollars a share in 1938.

[fol. 272] Q. Going back to his Honor's question for a moment, you understood that Independence directed some broker to buy certain stocks?

A. Definitely no.

Q. Who was told to buy the stock?

A. Independence Shares Corporation directed the Pennsylvania Company, the trustee—

Mr. Bohlen: If your Honor please—

Mr. Shapiro: Pardon me—

Mr. Bohlen: May I say something here?

Mr. Shapiro: Is it an objection?

Mr. Bohlen: Yes, I object.

Mr. Shapiro: Will your Honor rule?

The Court: I will overrule the objection. The witness made a statement. I would like to have it clarified. If that statement is not in agreement with your own thought in the matter, we will allow you to make a statement, since you represent the Pennsylvania Company.

Mr. Shapiro: Will you answer the question? Will you read the question to him?

(The question was repeated by the reporter as follows:

"Q. Going back to his Honor's question for a moment, you understood that Independence directed some broker to buy certain stocks?

A. Definitely no.

Q. Who was told to buy the stock?"

A. My understanding is that the Pennsylvania Company directs the broker to utilize the proceeds.

By Mr. Shapiro:

Q. The Pennsylvania Company directs whom?

A. If you don't mind, Mr. Shapiro, I am not employed for that phase of the business.

[fol. 273] Mr. Bohlen: Your Honor, may I—

Mr. Shapiro: Pardon me—

The Witness: It is unfair to ask me as to the gymnastics and mechanics because I am not employed for that phase of the business.

By Mr. Shapiro:

Q. Do you know anything about it or not?

Mr. Bohlen: I make a motion to strike off the answer because the witness is talking about something done by other parties.

Mr. Shapiro: That he knows nothing about.

Mr. Bohlen: That he knows nothing about.

Mr. Shapiro: If that is the statement of Mr. Bohlen and Mr. Irwin agrees to it, I join in the motion and ask that the previous answer be stricken out, and I move that any statement he made about that be stricken out.

The Court: Do you concur with Mr. Bohlen's statement?

Mr. Irwin: I believe any testimony of Mr. Porteous concerning the arrangement between the Pennsylvania Company and Independence Shares Corporation may be stricken out because I frankly don't think he knows very much about it and he has so said.

The Court: Strike it out.

By Mr. Shapiro:

Q. Now, Mr. Porteous, you said two dollars a share was paid by the Bankers Trust?

A. Yes.

Q. What was the dividend on the Borden Company, what dividend were they paying?

[fol. 274] A. \$1.40. \$1.60 in 1937 and \$1.40 in 1938. The dividend was reduced in the course of the calendar year of 1938. The dividend amount was \$1.40.

Q. Will you go back to the Bankers Trust and tell me what was the selling price of that—the market price at the time you suggested or advised the sale of it? Is there anything in your records to show that?

A. No.

Q. Do you know what it was?

A. No.

Q. You don't know. Was it discussed in your letter at all, the price?

A. Well, the current values were mentioned.

Q. Won't you look at your records?

A. The current values—

Q. Won't you look at your letter and see whether the price at that time is discussed in your letter?

A. I can hear you all right.

Q. If you would only let me finish you would probably hear me better.

A. The actual price is not mentioned in the letter.

Q. Is the yield of that stock discussed in your letter?

A. The yield of that stock is not discussed in the letter.

Q. Is the same true of the Borden Company, is the price and yield in your letter?

A. The actual price and yield are not mentioned. I would like to put into this record at this time my letter of February 6th shows the particular prices other than the actual transactions which occurred, and with the fluctuations in the market, I did not put in the yield or actual market prices in this letter, merely referring to current values.

Q. Consolidated Edison Company of New York, what was the dividend that stock was paying?

A. Would you go back to the Borden Company for a second?

Q. I am through with it. If you have something to say about it, you can say so.

[fol. 275] A. Did you mean the yield at the beginning of 1938 or at the end of 1938?

Q. I mean at the time you wrote that letter. If there is anything in your letter as of the date of that letter show-

ing what was the market price of the Bankers Trust or Borden and Company, and what was the yield to the investor who owned it.

A. The specific price and definite yields are not mentioned in this letter. They were discussed at the board of directors' meeting but not mentioned in the letter.

Q. Consolidated Edison Company of New York, do you have in the letter the dividend it paid?

A. Yes.

Q. What was it?

A. \$2. \$4 in 1932 and \$2 in—

Q. Won't you answer my question?

Mr. Irwin: If your Honor please—

By Mr. Shapiro:

Q. I asked you the dividend it was paying at the time you wrote the letter.

A. I have never been on the witness stand before.

The Court: All you have to do is to answer the question. If you don't understand the questions, say so, and they will be clarified in your mind. If you have something you want to add to your answer in addition to answering the questions "Yes" or "No," you may do so.

The Witness: What was the question?

By Mr. Shapiro:

Q. What was the dividend paid by Consolidated Edison Company of New York at the time you wrote that letter?

A. \$2 per share per annum.

Q. You don't have the price in that letter of the stock at that time, the market price?

[fol. 276] A. The actual market price as of the date of the writing of the letter is not here. However, the market price—

Q. You have answered my question. You said you were never on the witness stand—

A. I want to qualify it.

By the Court:

Q. Was the price in your letter? In other words, what he wants to know is what information was placed at the

disposal of the committee of the Independence Shares Corporation.

Mr. Shapiro: In that letter.

The Court: In that letter.

The Witness: Well, Judge, if I might say, if I were to write about Consolidated Edison and make it specific and definite, I could probably write volumes.

By the Court:

Q. You did or did not do certain things. In your letter you gave the price of this stock, the prevailing market price and the dividend and the yield, or you didn't. You said that information was not given in the letter in connection with the stocks, but you did mention it at the meeting. It is a simple enough question, and it is not what reasons prompted you to do a certain thing, that is not being asked you, you are being asked as to what information was in the letter.

A. All right. That information was not in the letter.

By Mr. Shapiro:

Q. National Biscuit Company. At the time you wrote that letter what dividend was it paying?

A. \$1.60 a share.

Q. Do you have the price of that stock at that time in your letter?

A. No, sir.

Q. The New York Trust Company, at the time you wrote that letter, what dividend was it paying?

[fol. 277] A. \$5 a share.

Q. Do you have the price in the letter?

A. No, sir.

Q. And the Philadelphia National Bank, what dividend was it paying?

A. \$5.

Q. Do you have the price in your letter?

A. No, sir.

Q. The Security National Bank; what dividend was it paying?

A. An irregular dividend which amounted to \$2.25 in the calendar year 1938.

Q. Do you know the price at that time, is it in your letter, I mean?

A. No, it is not in the letter.

Q. Do you know what price—what dividend the Atchison, Topeka and Santa Fe Railway Company was paying at the time you wrote the letter?

A. Say that again?

Q. Do you know the dividend the Atchison, Topeka and Santa Fe Railway Company was paying?

A. If your Honor please, it is an ambiguous question because it paid no dividend. I can say there was no dividend being paid.

Q. That is the answer.

A. You asked me what dividend was being paid.

The Court: Let us not argue about it.

By Mr. Shapiro:

Q. The answer is there was no dividend paid, is that right? Did you know that this company paid \$122,000 for this stock and that at the time you wrote that letter, at or about the time you wrote the letter the stock was at a value of only \$60,000 on the market? Did you know that?

A. Yes.

Q. Did you know how long there had been no dividend paid by the Atchison, Topeka and Santa Fe Railway? For how long hasn't a dividend been paid?

[fol. 278] A. A dividend was paid in 1937 but none in 1938.

Q. Do you know whether there was any paid in 1936?

A. I haven't the records with me.

Q. Did you know whether the bonds were in default in 1938 and 1937 interest on the bonds or payment of principal of the bonds?

A. I have those records in my office.

Q. This book you have given us will cover that, will tell us whether the bonds were in default?

A. It doesn't show that.

Q. Don't you know of your own experience in your brokerage houses, you were acting as investment counsel, don't you know that the bonds of that railroad were in default?

Mr. Irwin: I object to this classifying the brokerage houses with this man's business. This man's advice came to us as investment counsel.

The Court: Strike out that part of the question.

By Mr. Shapiro:

Q. As investment counsel don't you keep yourself familiar with the condition of the stocks on the market?

A. Yes, sir.

Mr. Irwin: If your Honor please, I submit that that is not fair cross-examination because your Honor knows and Mr. Shapiro knows that nobody can keep in his head the records of the thousands of securities that are listed on the New York Stock Exchange, and all of the bonds and stocks.

The Court: This witness can make that reply.

By Mr. Shapiro:

Q. Do you or don't you?

A. What was the question, please?

(The question was repeated by the reporter as follows:

[fol. 279] "Q. As investment counsel don't you keep yourself familiar with the condition of the stocks on the market?"

The Witness: Yes, and I knew that income bonds of Atchison were not paying interest. They were income bonds, however. I also knew that the Atchison mortgage bonds were considered of high class.

By Mr. Shapiro:

Q. Were they paying interest?

A. Yes.

Q. You did know that?

A. Yes.

Q. Do you know what the Manhattan Company is?

A. Yes, sir.

Q. What is it, a bank?

A. It is the Bank of Manhattan Company.

Q. Was it paying dividends in February, 1938?

A. I don't know the exact month, sir.

Q. All right, when you wrote that letter?

A. That was February, 1939.

Q. Was it paying dividends?

A. Well, now, that is not from an investment viewpoint, I wouldn't want to put it that way. I think I can say dividends will be paid quarterly in 1939.

Q. I didn't ask you that, I asked you whether at the time you wrote this letter you know whether Manhattan Company was paying dividends too?

A. The Manhattan Company was paying dividends.

Q. I am putting my question my way, Mr. Porteous, not yours. My question is in 1939, February, when you wrote the letter which you have been using; and which counsel has offered in evidence, was the Manhattan Company paying dividends or not?

A. The Manhattan Company was paying a dividend.

Q. How much?

A. I do not recall. I believe it was thirty-seven and a half cents quarterly, but I wouldn't guarantee that statement.

[fol. 280] Q. How much quarterly?

A. I believe it was thirty-seven and one-half cents, but I wouldn't guarantee that statement. It may be reduced from thirty-seven and one-half cents.

Q. Do you have anywhere any papers showing your review of this portfolio and what notations you made with regard to each one of these stocks before you wrote this letter of February, 1939?

A. I don't have such records with me.

Q. Do you have such records?

A. Certainly.

Q. I mean that you made. Specifically, when I say that I am assuming that when you wrote the letter or before you wrote the letter you went over all these stocks and analyzed their situation as to dividends and as to earnings and as to default or condition of bonds and obligations, and then you gave your opinion on the four or five stocks?

A. That's right.

Q. That's right, is it?

A. Yes.

By the Court

Q. Definitely, did you make an analysis of each and every stock of the portfolio of the trust certificates?

A. Yes, your Honor, that is a rather continuous process job. I wouldn't say that you could say on February 6th all forty-two stocks had been analyzed.

Q. Approximately, I don't mean that very day. You did make an analysis with regard to the facts Mr. Shapiro mentioned and with regard to the position of the respective stocks in the field?

A. Yes.

Q. Their prospects, and so forth?

A. Yes.

Q. You did go over these stocks?

A. Yes.

By Mr. Shapiro:

Q. You did?

A. Yes.

[fol. 281] The Court: He said he did.

Mr. Shapiro: He said he did, did you say?

The Court: Yes, he said he did.

By Mr. Shapiro:

Q. Why did you just pick out those five stocks in the letter to write about?

A. You mean seven, don't you?

Q. Seven, whatever it was.

A. Because they didn't measure—

Q. I see, your memory is good. What did you say?

A. It's my business, I ought to know.

The Court: You are getting away from the subject.

By Mr. Shapiro:

Q. Why did you pick out those seven stocks?

A. For the reasons incorporated in this letter and briefly discussed before the Court.

Q. And what was that?

The Court: Briefly discussed before the Court.

By Mr. Shapiro:

Q. Why did you pick those seven? Why did you tell them to sell Philadelphia National Bank which showed a profit of over \$5000 and was paying \$5 dividend and not to sell the Manhattan Company which showed a loss of \$30,000, more than 50 per cent of its value? Why did you do that?

A. I think it has been gone over.

Q. No, it has not.

A. It has.

Q. You answer the question.

Mr. Irwin: Answer the question.

The Witness: I am not referring to the

Mr. Irwin: Answer the question.

[fol. 282] The Witness: The answer is that the Philadelphia National Bank has only 15.5 per cent in commercial loans and discounts as of December 31, 1938, that the management, while it is of the highest class and outstanding in reputation, is not, in our opinion aggressive and progressive, and is not seeking new outlets—

Mr. Shapiro: Mr. Porteous—

The Court: Let him finish.

By Mr. Shapiro:

Q. I thought you were through, that's why I wait a long time, I am waiting for you to get through. I am listening to you.

A. Your Honor, if you don't mind, I am discussing this because I was asked.

The Court: Mr. Irwi wants you to complete your statement.

The Witness: The management of the Philadelphia National Bank is apparently not seeking outlets for its money through a personal loan department or through the financing of automobile paper or through the financing of—

Mr. Shapiro: Go ahead, I am listening.

The Witness:—five year insurance plans, and the current trend in banking in having a large number of smaller accounts on which service charges can be assessed finds the Philadelphia National Bank in an inadequate position to benefit by this current trend in banking. Furthermore, the Philadelphia National Bank has an excessive amount of cash idle, unproductive, and has, according to the standards of Porteous and Company, too large a proportion in Government bonds. A market trend downward in Government bonds occurred at one time when the United States liberty loan bonds where one of the issues sold at 82. Such a decline [fol. 283] in Government bonds would seriously impair the capital of the institution and certainly seriously impair both the dividend and the principal as represented by the price of the stock. It was prior to such possibilities that the sale was recommended.

By Mr. Shapiro:

Q. Is the Manhattan Company called the Manhattan Bank or the Bank of Manhattan?

A. Yes, sir.

Q. Didn't you know at the time you recommended the sale of the Philadelphia National Bank it had shown a profit, as against the Manhattan Company, and that the Philadelphia National Bank was paying approximately 5 per cent dividend on the then market value of its stock?

A. Yes, I knew that.

Q. You did. Did you know what the Manhattan Bank was paying? You said Manhattan was paying a dividend. Did you know what it was paying?

The Court: He said to the best of his recollection it was thirty-seven and one-half cents.

The Witness: To the best of my recollection it reduced the dividend. I could look it up.

By Mr. Shapiro:

Q. Will you do that please? Show me when it reduced its dividend and what it was paying.

A. The rate was reduced to eight cents annually during the course of the calendar year 1938.

Q. Eighty cents.

A. Annual during the course of 1938.

Q. What did the price range go in 1938?

A. Sir?

Q. What did the price range go in 1938?

A. In 1938?

Q. Yes.

A. I don't have it in these records, but I can supply it.

Q. I wish you would.

[fol. 284] A. Twenty-four was high and the low was thirteen and a half.

Q. Twenty-four was high and the low was thirteen. Do you have the last quotation on it?

A. No, I don't.

Q. That is in one year.

A. The last quotation is somewhere around about that. It was in the year 1938, yes.

Q. I have here about fifteen.

A. That's about correct.

Q. How about Philadelphia National Bank, can you give me the price range in the last year? We are talking about 1938, I suppose, aren't we?

A. Yes, sir. 107½.

Q. Was what?

A. High in 1938.

Q. What was the low in 1938?

A. 93.

Q. What was that?

A. 93.

Q. Selling today at 105, isn't it, 102 to 105?

A. You should have warned me about this.  $102\frac{1}{2}$  was the bid price.

Q. 105 is the asked,  $105\frac{1}{2}$ ?

By the Court:

Q. What is the asked price, Mr. Porteous?

A. He gave it.

By Mr. Shapiro:

Q. Is that correct,  $105\frac{1}{2}$ ?

A. I have  $106\frac{1}{2}$  in this paper.

Q.  $106\frac{1}{2}$ . All right.

A. Mr. Shapiro, the printed prices are not correct. They are a wide approximation.

Q. We will not argue about one dollar, it's unimportant.

A. That's why I didn't correct you on your  $6\frac{1}{2}$ .

[fol. 285] Q. I know why you didn't correct me. Bankers Trust Company, what dividend do they pay?

A. At present, \$2.

Q. \$2. The price is around \$50 a share?

A.  $50\frac{1}{2}$  bid.

Q. That is 4 per cent. investment, approximately?

A. Mr. Shapiro, I can't agree to that.

Q. Is it or not? You can figure it.

A. I refuse to answer that.

Q. Do you?

A. Yes, I do.

Q. That's all right, I am satisfied.

A. Because it is a bond, a high class bond with a maturity date near by.

Q. Is there anything the matter with Bankers Trust Company, anything wrong with it, let us put it that way?

A. You mean termites in the building?

Q. Is it an insecure investment? Is it an insecure investment?

The Witness: What does he mean?

The Court: I don't know. I thought you were talking about the bank.

Mr. Shapiro: Yes, the bank.

The Court: You spoke about it a moment ago.

The Witness: If I said "insecure" I might be sued for causing a run on the bank.

Mr. Shapiro: You can't be sued.

The Court: The question was asked as to the yield. I am going to take judicial notice of the fact that \$2 is about 4 per cent.

Mr. Shapiro: I want to say that I am asking these questions deliberately so that your Honor knows how this witness answers. I have no secrets about this.

[fol. 286] Mr. Irwin: I think I should protest against statements like that from Mr. Shapiro because this witness has been very frank and fair.

The Court: I think I have said one hundred times during the last week that you are not before a jury and I am not very impressionable when it comes to remarks of counsel.

Mr. Shapiro: I think my remark is perfectly proper.

The Court: That goes for both.

The Witness: You made the comment that you were taking judicial notice of the fact.

The Court: That \$2 is 4 per cent. of fifty.

The Witness: From an investment standpoint, I want to volunteer this information.

Mr. Shapiro: I object to his volunteering any information.

The Court: I will sustain the objection. It really isn't important.

The Witness: But I must say that it goes to the heart of the proposition.

The Court: We will hear the explanation.

Mr. Shapiro: Will you grant me an exception?

The Witness: The performance of a principal on a bond is of greater importance in value than the current income under a trend.

The Court: I understand there are other factors in making investments.

The Witness: May I inquire of the Court what happened to the people who bought Borden on a yield basis in 1932? It has a price today, but the dividend is half.

[fol. 287] The Court: Mr. Porteous, I want to say that I am aware of the fact that there are other considerations than that of yield in making investments:

By Mr. Shapiro:

Q. Mr. Porteous, what was the dividend by the Aetna Life Insurance Company of Hartford in 1938?

A. I don't have those records.

Q. What did you say?

A. I don't have those records with me.

Q. You don't have those records with you in court. What was the dividend paid by the First National Bank of Boston?

A. I don't have those records.

Q. What was the dividend paid by the Home Insurance Company?

A. The records are not here.

Q. What was the dividend paid by the Insurance Company of North America of Philadelphia?

A. I don't have the records in court.

Q. Don't you have any of those records prepared—

A. Well—

Q. Wait until I finish, please. Don't you have any of those records prepared so that when this matter was discussed before the board of directors you could give them the information they would ask at that time as between the things you recommended and the rest of the portfolio? The stocks you recommended for sale and the rest of the portfolio?

A. Yes, those records were available at that time. You are referring not to the letter but to the February 17 board of directors meeting?

Q. I am referring to the date you wrote that letter. I want to know why you picked out those seven stocks out of a clear sky and suggested their sale?

The Court: Well, we will strike "out of a clear sky."

[fol. 288] By Mr. Shapiro:

Q. Without making a comparison with the others?

A. Mr. Shapiro, that letter was written—in answering your question—that letter was written after considerable thought and study of all available records and the application of current economic and business trends, and those

records were at hand when the letter of February 6 was dictated. If we had included the current position of all forty-two companies at that time the letter would have been so extensive that frankly I would have wanted a larger retainership fee; but the information was there and available. The information was considered at the time of the writing of the letter of February 6.

By Mr. Shapiro:

Q. It was where? Where was it available?

A. At our office in New York City where the letter was composed and written.

Q. Available to you?

A. Available to the client and to Porteous and Company.

Q. But it was in your office in New York City?

A. Right. They were in Philadelphia, and we were in New York.

Q. Why did you write this letter of February 6, 1939?

A. I wrote that letter of February 6, 1939 in the interest of the certificate holders, contract holders and planholders of Independence Shares.

Q. Who told you to write the letter?

A. Douglas K. Porteous told me to write that letter.

Mr. Shapiro: Maybe this witness thinks this is funny, if your Honor please, but I don't. I asked him who told him to write the letter.

By Mr. Shapiro:

Q. Will you answer the question? Who told you?

A. My own conscience, my own study, my own matured judgment. I am an old man, investment wise. I have lived with studies—

[fol. 289] Q. Will you answer my question? Who told you?

The Court: He said he did it of his own volition. That is what the answer means.

Mr. Shapiro: I don't know who Douglas K. Porteous is.

The Witness: The records will indicate that is the party on the witness stand.

By Mr. Shapiro:

Q. Nobody suggested the writing of the letter except yourself?

A. Yes.

Q. Have you any other letters like this you wrote when your conscience prompted you to tell Independence Shares how you felt about it during the previous years you were receiving the \$2400?

A. It is not available in court.

Q. Did you write such a letter?

A. Recommending liquidation of securities?

Q. Yes.

A. I correspond with them quite a bit.

Q. Did you write such a letter?

A. No.

Q. This, I take it, is the only letter of its kind you wrote, moved by your conscience, to tell these people—I am serious about this, Mr. Porteous and your laughing interrupts me—did you write any other letters which your conscience prompted you to write about the portfolio that this company had?

A. Of my own volition, a letter of that type had not previously been written. That is the only letter of this type that was written.

Q. Have you any letter that was written not of your own volition but at the request of the company which employed you?

A. No other letters were written at the request of the company which employed me.

[fol. 290] Mr. Shapiro: May I have a copy of the minutes of the meeting that was held in connection with this matter?

Mr. Irwin: It is one of the exhibits. It is Exhibit 32, I think.

Mr. Shapiro: I notice in these minutes, Mr. Irwin, that reports were secured from the Argus Research Corporation and J. H. Brooks and Company and Auchincloss, Parker and Redpath. Are those available here today?

Mr. Irwin: I think we have them.

By Mr. Shapiro:

Q. Would you say the bank stocks were less speculative than the other stocks in the portfolio of the people who employed you?

A. Am I required to answer that question?

Mr. Irwin: Answer the question and qualify it in any way you want.

Mr. Shapiro: Your Honor, you are asked by this witness whether he is required to answer that question.

Mr. Irwin: I object to it because it is an unfair characterization. You are asking the witness to assume that the stocks are speculative when you ask that question.

The Court: I will overrule the objection and grant you an exception and direct that the question be answered.

The Witness: Bank stocks recommended for liquidation are less speculative than the remaining stocks in the portfolio, in the opinion of investment counsel. They are, however, not as desirable investments for future holding as the remaining securities in the portfolio, in the opinion of investment counsel.

[fol. 291] By Mr. Shapiro:

Q. Were you acquainted with the letter of Auchincloss, Parker and Redpath? Did you know when you went to that meeting that these opinions had been asked from these various people?

A. Mr. Shapiro, the first time I saw the letter that you have there was at this board of directors' meeting, and I do not recall whether I had been advised in the long distance telephone conversation prior to February 17, if so, only one or two days prior to that, that other independent investment counsel groups had recommended the disposal of a larger number of stocks than Porteous and Company recommended.

Q. You have not answered my question, have you? I asked you whether you knew that the information or advice of Auchincloss, Parker and Redpath had been requested on this subject matter?

Mr. Irwin: If your Honor please, I submit the witness has answered that question. He said he doesn't know whether he was advised two or three days before this meeting. He first saw the letter that day.

The Court: You want to know whether he knew at the time, of the contents of that letter?

Mr. Shapiro: I have asked him a simple question.

The Witness: I think I can answer your question.

Mr. Shapiro: Will you please allow me to finish my discussion with the Court? You will remember this witness said he attended a meeting of the board of directors. I want to know whether he knows that this information was

requested from Auchineloss, Parker and Redpath, and that's all I want to know, and I think I have a right to know that.

The Court: You can answer that "Yes" or "No" and then if you want to add anything to it, you may. Did you or didn't you know that?

[fol. 292] The Witness: I did not know prior to February 15 that this information had been requested.

By the Court:

Q. When did you first learn of it if you ever learned of it?

A. I am not positive.

Q. You don't know whether you ever learned it?

A. I learned it on February 17 or in the two days prior to February 17.

By Mr. Shapiro:

Q. My question was—I am going to repeat it again. Did you know when you attended the meeting of the board of directors that a request had been made to Auchineloss, Parker and Redpath for their advice on this very subject matter?

A. Yes.

Q. Did you know that when the meeting was held the advice had already been received? Did you know that?

A. Yes.

Q. So that this statement in the minutes of February 20 that other investment counsel service should be obtained for comparison purposes refers to a report already received, is that right? Just a minute, Mr. Irwin, I am examining this witness.

Mr. Irwin: You are examining him about a board of directors meeting when that started on the 15, 16 and 17.

Mr. Shapiro: May I continue to examine?

The Court: Go ahead.

The Witness: I knew on the 17th that other advice had been obtained. As to whether or not I was fully aware of all of the various sources of additional advice I am not qualified to say.

By Mr. Shapiro:

Q. I only asked you about this phase. Did you know in that letter which is dated February 17th—this meeting was

[fol. 293] held on the 20th of February—did you know that in that letter that they said the following:

“Consideration might be given to the possible liquidation of Manhattan Company and National City Bank in place of the Security National Bank of Los Angeles for the present . . .”

Did you know that?

A. Yes.

Q. You did know that?

A. Yes, I did know that.

Q. All right. Now, did you know that in their letter, or, rather, did you know that they were only requested not to give information as to which of the stocks in the portfolio should be sold, but whether or not, National Biscuit, Borden Company, Consolidated Edison, Bankers Trust Company and the others listed should be sold? Did you know that?

A. I would like to refresh my memory by reading the first page of the letter.

Q. “In response to your request we are pleased to write you concerning suggestions which have been made for the elimination of certain securities from the Trust. The securities suggested are listed below: National Biscuit, Borden Company, Consolidated Edison of New York, Bankers Trust Company of New York, New York Trust Company, Security First National of Los Angeles and Philadelphia National Bank.”

A. Yes.

Q. Did you know that? Is that true of all the others whose opinion was requested?

A. I am not competent to say that, I am not a principal of Independent Shares. I don't know.

Q. You were there.

The Court: He says he doesn't know.

By Mr. Shapiro:

Q. You don't know?

A. No.

[fol. 294] Q. All right. If it had been discussed at the meeting of February 20 you would have known it?

Mr. Irwin: I think Mr. Shapiro is referring to the meeting of February 20, and I don't believe that is the date of

the meeting, is it? February 20—February 23; February 22.

The Court: It doesn't make much difference.

Mr. Shapiro: I said February 20.

The Court: Yes, you did.

Mr. Irwin: I was wrong.

By Mr. Shapiro:

Q. Did you know that Harold B. Dorsey, president of the Argus Research Corporation said in his letter which was also restricted to the information requested,

"It may be none of our business, but it seems to us that your representation in the Oil Industry is relatively heavy."

A. Yes, I knew that.

Q. "After the above stocks have been eliminated, five out of the remaining thirty-five issues will be oils which will be heavier than any other individual group except the bank and insurance category; consequently if you are considering eliminating other issues, I would suggest that you consider Atlantic Refining. As you probably know, the crude oil statistical position is strong and the finished oil products' position relatively weak. This condition suggests difficulty in improving the profit margin of the refiner and marketer, which of course directly applies to Atlantic Refining."

A. Is that a question?

Q. Yes. Did you know that?

A. Yes, I did know that.

Q. So that I am correct in understanding that the question asked of these independent companies whose names I [fol. 295] read was "Would you advise that we dispose of these securities," naming the seven securities that we have discussed?

A. Mr. Shapiro, your Honor, I am an outside person, insofar as Independence Shares Corporation is concerned. I believe that counsel's question really should be to somebody in Independence Shares Corporation. I know that they obtained all sorts of outside advice.

Q. Did you read it?

A. As to what basis they sought it, I believe that is Independence Shares Corporation's business.

Q. Will you answer my question?

A. I am not able to answer your question.

Q. You did know that they had sought advice?

A. Yes.

The Court: That is apparent.

By Mr. Shapiro:

Q. Did you read the advice that they got?

A. Not entirely, and I don't know, Mr. Shapiro, that I saw all the advice that they obtained.

Q. I see.

A. If you don't mind, Mr. Shapiro, when this meeting was in progress—

Q. I am listening, go ahead.

A. When this meeting was in progress I excused myself once or twice and they were discussing advice from other houses, because I didn't think, in my capacity, I should be at certain discussions.

Q. Don't you think you ought to know—

The Court: Regardless of whether or not he does, he wasn't there. He may be wrong in absenting himself, but it was what he did.

By Mr. Shapiro:

Q. Don't you think, you as their adviser, should listen to the opinion of others in the same line of business?  
[fol. 296] A. Yes, I do, and I did listen to the opinion of others, but I am not certain as to whether I listened to the advice that was obtained from all sources.

Mr. Shapiro: Has anybody got the J. H. Brooks letter? that is the same as the other.

Mr. Irwin: Argus, I think is the same as Brooks.

By Mr. Shapiro:

Q. Didn't the Auchinloss letter say that the Philadelphia National Bank stock was considered a very good holding?

A. Was that all they had to say about it?

Q. "But its market price is so high that it would be difficult to make up a combination of substitutions for this issue." Did you know they said that?

A. Your Honor, I knew they said that but I don't see any objection to it.

By the Court:

Q. Do you agree or disagree with it?

By Mr. Shapiro:

Q. Did you know they said, "The Security First National Bank of Los Angeles, on the basis of published statements shows a comparatively high rate of earning power as well as dividend payments in relation to market price."?

A. Yes.

Q. Did you know that they said "It is assumed that there is probably some specific reason for the recommendation to liquidate this issue outside of the information which might be gleaned from public reports"? Did you know they said that?

A. Yes. Your Honor, if I might interrupt at this particular moment, I want to say for the record that investment analysts and investment counselors often disagree.

The Court: Yes, of course. That's what makes horse races.

[fol. 297] By Mr. Shapiro:

Q. Were you consulted about the elimination—

The Court: We will take a recess until 1:30.

(Recess from 12:30 o'clock P. M. to 1:30 o'clock P. M.)

After Recess

Present: Counsel as before noted.

DOUGLAS K. PORTEOUS, recalled.

Cross-examination (Continued).

By Mr. Shapiro:

Q. Mr. Porteous, as investment counsel for this company, Independence Shares Corporation, I suppose you know that between February, 1938, and August, 1938, there had been an increase in the portfolio by 361 shares of each of the stocks, 42 stocks.

A. I knew there had been an increase, but I didn't know the exact amounts, sir.

Q. All right. Did you advise them in connection with that at all?

A. No.

Q. Do you know notwithstanding the fact that, for instance, the Atchison, Topeka and Santa Fe Railway in 1938 had not paid its dividend and defaulted in some bond that you referred to—notwithstanding that fact, they bought 361 shares of that stock?

A. I am aware that they increased their participation in the Atchison stock.

Q. You were not asked at that time about continuing to buy Atchison, Topeka and Santa Fe Railway, notwithstanding the fact that they were in the condition that I have just referred to?

Mr. Irwin: If your Honor please, I object on this ground: We had no right to change these securities; we were selling [fol. 298] Independence Trust shares secured by 42 stocks. Unless the stock was eliminated from the portfolio entirely we couldn't come along with the next lot of Independence Trust shares and buy 41 stocks. As your Honor can well understand, under our indenture of trust those stocks were there until eliminated.

The Court: He simply asked him whether or not he advised them in connection with the purchase of stocks or bonds, whatever it may be.

Mr. Shapiro: I suggest they had as much right to sell this one stock as the others.

The Court: That is all a matter of argument.

The Witness: What is the question, please?

Mr. Shapiro: Read the question to him.

(The question was repeated by the reporter as follows:

“Q. You were not asked at that time about continuing to buy Atchison, Topeka and Santa Fe Railway, notwithstanding the fact that they were in the condition that I have just referred to?”)

A. My employment, my relationship with Independence Shares Corporation necessarily brings me the knowledge that incoming dollars will be awarded at that time as referred to by Mr. Shapiro, being placed proportionately into 42 common stocks, and I knew between those dates that you mentioned that additional moneys would be going into Atchison, Topeka and Santa Fe.

Mr. Shapiro: Will you read the question to the witness?

By the Court:

Q. Let's save time. Were you consulted with regard to that? Were you consulted with respect to the additional purchase of Atchison, Topeka and Santa Fe? Yes or no, were you consulted?

A. Yes.

[fol. 299] By Mr. Shapiro:

Q. You were consulted. Did you advise the purchase of more of the Atchison, Topeka and Santa Fe Railway stock?

A. Yes.

Q. You did. Did you know that the stock had depreciated in price from an average of \$80 a share that had been paid for this stock until it was around \$20 when you advised that?

A. I knew there had been a depreciation, Mr. Shapiro, I am not certain as to the authenticity of the exact prices you mentioned.

Q. The prospectus of the company shows that 1416 shares cost \$115,000 in round figures, which I take it is about \$80 a share average, and that 1677 shares cost \$122,000, or \$7200 for 360 shares, which would be approximately \$20 a share.

A. Yes.

Q. You knew that?

A. Yes.

Q. At the time you advised this you knew that they were not paying dividends, that stock?

A. Mr. Shapiro—

Q. Can't you answer that yes or no?

A. No, I cannot. I object. I cannot answer that question. If you ask me if I knew at that particular time that Pennsylvania Railroad was not paying a dividend; I would have to say yes—

Q. No, Atchison, Topeka and Santa Fe.

A. Wait. This is an investment company. I will say Pennsylvania Railroad paid a dividend in 1938.

Mr. Shapiro: I ask that the answer be stricken out as not responsive.

The Court: Strike it out.

By Mr. Shapiro:

Q. You were asked whether you knew at the time the additional shares of Atchison, Topeka and Santa Fe Rail-

[fol. 300] way Company were purchased that they had not paid a dividend for the year of 1938 on that stock.

A. I knew that they had not yet paid a dividend during the calendar year of 1938.

Q. Did you know at that time that the bonds you referred to previously were in default, the interest on the bonds?

A. Yes. Your Honor, if you don't mind, the failure to pay a dividend on the common stock is different.

The Court: That was covered this morning.

The Witness: It is different from a default.

By Mr. Shapiro:

Q. No question about that. In order to save the time of going over each and every one of these stocks, you did know, did you not, that there were a number of the stocks in this portfolio that had depreciated in values—instead of saying "number," say several of them had depreciated in values and were not paying dividends at the time the additional stocks were purchased in the same company.

A. Will you repeat that, Mr. Stenographer?

(The question was repeated by the reporter.)

The Witness: Yes. Your Honor, may I also add to that "yes," that 41 out of the 42 stocks paid dividends in 1938.

By Mr. Shapiro:

Q. 41 out of the 42?

A. Yes.

Q. Which was the one that did not?

A. Atchison.

Q. Was that the only one?

A. Yes. I think in fairness to my client, the defendant in this suit, I believe that I should bring out that I employed—Porteous and Company—Mr. John Leeds Kerr, a railroad economist who has been retained by Mr. Eugene Meyer, and who has been retained by American Locomotive, [fol. 301] and who was at one time head of the railroad department of Standard Statistics. Mr. John Leeds Kerr was employed by Porteous and Company, Incorporated, to make an independent survey of the Atchison, Topeka and Santa Fe Railway. Mr. Kerr interviewed executives, inspected workshops and round houses, talked with shippers, talked with competing lines, surveyed crop and weather con-

ditions, and industry conditions in the territory served. Your Honor, in fairness to my client I think this should be brought out.

The Court: Don't you see, this is a matter of argument.

Mr. Irwin: You go ahead, tell your reasons, that is all.

The Witness: This independent expert that we retained strongly recommended the retention and further purchase at the then current prices of that common stock.

By Mr. Shapiro:

Q. Did all the life insurance company stocks pay dividends in 1938?

A. Only one life insurance company, there, Mr. Shapiro—

Q. I don't mean life insurance companies, the Aetna Company.

A. Fire and casualty and automobile.

Q. Did all the insurance companies pay dividends in 1938?

A. Yes.

Q. Did the Aetna Life Insurance Company pay a dividend in 1938?

A. Yes.

Q. Did the Fidelity Phoenix Fire Insurance Company pay a dividend in 1938?

A. Yes.

Q. Did the Insurance Company of North America pay a dividend in 1938?

[fol. 302] A. Yes.

Q. And Home Insurance Company paid a dividend in 1938?

A. Yes, sir.

Q. Did any of those companies pass any dividends in 1938?

A. Pass any dividends in 1938?

Q. Yes. When you said all of them paid dividends in 1938, it may be that some of them paid them in the early part, and then in the last or middle didn't pay any; did any of those companies pass dividends in 1938 or announce that they were not going to pay a dividend which should have been declared in 1938, payable maybe in 1939?

A. Now, Mr. Shapiro, the present tax laws on corporations have changed in great measure—

Q. Can you answer my question?

A. I cannot; no, sir; not without qualification.

Q. That is the end of it; if you can't answer, then you can't answer.

A. May I proceed, Judge?

The Court: Go ahead.

The Witness: Due to tax laws, corporations at present are not paying quarterly dividends with the same regularity and confidence as in earlier years. There is more of a tendency to wait—

The Court: That is not a responsive answer.

Mr. Shapiro: I ask that it be stricken from the record as not responsive.

The Court: It will be stricken from the record.

The Witness: If I may speak off the record—

By the Court:

Q. It is not a responsive answer. You said that all of these forty-two stocks but Atchison, Topeka and Santa Fe were on a dividend basis on December 31, 1938; you know what that means, don't you?

[fol. 303] A. On December 31, 1938, but as to passing quarterly and semi-annuals, I would rather say the custom is changed to make it an annual basis.

The Court: I know. That is why I put the question as I did.

By Mr. Shapiro:

Q. Is the American Gas and Electric Company on the big board?

A. It is on the New York Curb Exchange.

By the Court:

Q. You say you had made an analysis of all of the forty-two stocks in the portfolio sometime prior to February 6th when you wrote this letter, 1939; you were making a continuous check, weren't you?

A. Yes, but just as a balance sheet is a photographic picture of a corporation at a certain date, our current appraisal as of, let us say, any February, was drawn on all the forty-two corporations.

Q. It was sort of a check or inventory, wasn't it?

A. Yes.

Q. In considering the various securities, of course, you had in mind the market price of the securities, didn't you?

A. Yes, we had in mind the market price, the then prevailing values.

Q. Did you have before you any information or data as to the prices at which these securities had been put in the existing portfolios?

A. Yes.

Q. And you had, then, the prices at which the stocks and securities had been put into the portfolios, and you had the then existing prices, the then prevailing prices?

A. Yes, sir.

Q. We will say within a period of thirty days, or since the beginning of the year?

A. Yes.

Q. At the beginning of 1939, what was the relationship of the two, cost and market, of these portfolios?

[fol. 304] A. I don't recall the ratio of the two. I don't want to extend the time too much, but the major weight and the balance was given not to the original cost price but to the outlook for earning power—

Q. I understand that. When you come to making recommendations you weigh numerous factors, you needn't recite them again. You said the prices were available to you, and you had in your possession the prices at which these securities had been put in the portfolio. You also had the prevailing market prices of the securities in the portfolio; what was the relationship between the two?

A. I don't recall.

Q. In other words, were the prevailing prices higher or lower?

A. Prices were lower.

Q. How much?

A. I don't recall.

Q. Didn't you make a general analysis of it?

A. Yes. Those are office notations and all of the pencil notations of the statisticians, and I don't recall them. They are probably in our files in New York City.

Q. You had the work sheets, didn't you?

A. Yes.

Q. In other words, you had a picture of the whole situation?

A. Yes, but I don't recall and I can't give it to you now, but it is available.

Q. All right, I would like to see your work sheets on it.

A. It will take some days; they are in New York.

Q. All right. Will you produce them? You may give a summary picture, if you will.

A. All right, sir.

The Court: As to the cost and the market price. That is all.

Mr. Shapiro: As of that date, you mean, your Honor? [fol. 305] The Court: As of, we will fix it, anywhere from January 1st, 1939, up until February 6th, 1939, when this letter was written.

Mr. Shapiro: February 20th.

The Court: To February 20th, the date of the meeting. I don't know whether you have brought those figures up to date during that time, but it may be that you have.

(A letter dated February 17th, 1939, consisting of thirteen pages, to Mr. A. H. Geary, Independence Shares Corporation, from Achnicloss, Parker & Redpath, was marked Exhibit D-2.)

(A letter, February 16th, 1939, consisting of two pages, to Mr. Alfred H. Geary, president, Independence Shares Corporation, from Argus Research Corporation, was marked Exhibit D-3.)

Mr. Irwin: If your Honor please, Mr. Shapiro has read extracts from these two other letters, and I now offer them in evidence. Mr. McCown, will you take the stand?

Mr. Shapiro: I object to the offer.

The Court: You read excerpts from the letters.

Mr. Shapiro: Is he offering the entire letter in evidence?

Mr. Irwin: Yes.

The Court: I will overrule your objection and grant you an exception.

[fol. 306] F. C. McCOWN.

#### Cross-examination.

By Mr. Shapiro:

Q. Who paid the premiums on the group life insurance?  
A. On the company's group life insurance?

Q. For the employees of the company.

A. The company paid a part of it, and the employees paid a part.

Q. Where is the account showing what the company paid?

A. In the office.

Q. Do you keep a record of it?

A. Yes, sir.

Q. Who distributed the policies?

A. Treasurer's office.

Q. The treasurer of your company?

A. The treasurer of our company.

Q. I suppose they were for employees, only, were they?

A. That's right.

Q. How much of the premium did the company pay?

A. I think the company paid one-third and the salesmen and employees paid two-thirds, it may be the other way around, I am not positive of that.

Q. I suppose your record would show how long you continued to pay for Mr. Balanos, wouldn't it?

A. I don't think in the case of Mr. Balanos that the company paid any part of that. I think it was all paid by Mrs. Balanos, because Mr. Balanos was not an employee of the Capital Savings Plan, Incorporated. He was an employee of Mrs. Balanos, who was our general agent, and the Connecticut General Life Insurance Company, which was the insurance company in the case, made an exception in the case of Mr. Balanos and included him in our group policy.

Q. What did Mr. Balanos do? What was his work?

A. He was a bookkeeper, as I understood it, for Mrs. Balanos.

[fol. 307] Q. Didn't you get any complaints about him at all?

A. From whom?

Q. From some customers or investors. You must have gotten a lot of complaints about him, didn't you?

A. I don't recall it.

Q. But didn't he sell any policies?

A. No, sir.

Q. Are you sure of that?

A. Positive of it, sir.

Q. Why do you say he didn't sell them? Do you mean he had nothing to do with the sale of them, or do you make a distinction about it?

Mr. Irwin: I object to that question as being an improper one. The witness has testified, and Mr. Shapiro's question is unfair, I submit.

The Court: I will overrule your objection and grant you an exception.

The Witness: May I have the question read, sir?

Mr. Shapiro: Certainly.

The Court: Mr. Irwin, it is apparent when he said that Mr. Balanos was employed by Mrs. Balanos that he did some work. He has identified her not only as Mr. Balanos' wife, but as a general agent of the company. The question is entirely proper as to whether in the discharge of any of his duties he did selling, also, in addition to the bookkeeping he mentioned. Go ahead.

(The question was repeated by the reporter as follows:

"Q. Why do you say he didn't sell them? Do you mean he had nothing to do with the sale of them, or do you make a distinction about it?"

A. Mr. Balanos was not licensed to sell contracts.

By Mr. Shapiro:

Q. So he said, but—

A. And we never had anyone sell contracts who wasn't licensed.

[fol. 308] Q. This little girl didn't sell contracts, either?

A. She did not.

Q. Have you got her account here with the company?

A. She never had an account with the company except as a contract holder.

Q. As what?

A. She held a contract; she held a Capital Savings Plan contract.

Q. Do you have her account here?

A. I don't think so, Mr. Shapiro.

Q. Can it be produced?

A. It can be produced. She didn't have any ledger account on the corporate books of Capital Savings Plan.

By the Court:

Q. Did she sell through Mrs. Balanos?

A. She never sold any contracts.

By Mr. Shapiro:

Q. Who sold her mother the contract?

A. Mrs. Balanos; her father, not her mother.

Q. Mrs. Balanos sold it?

A. Yes.

Q. Have you got her father's contract here?

A. I believe it is here. The error of not bringing Miss Burdette's card is my fault, I had forgotten it.

Q. What did you say your position was?

A. I am vice-president and director of the Independence Shares Corporation.

Q. You would then be familiar with what this card means that has been just produced?

A. To some extent.

Q. You tell the Judge what that means, for the record.

A. This means on these dates a payment of \$10 was made to the Pennsylvania Company.

Q. By whom?

A. By John A. Burdette, the owner of Capital Savings Plan A-10621.

Q. How many times?

[fol. 309] A. Three times, three payments he made.

Q. Where is there anything on that card that shows he paid \$10?

A. This, Mr. Shapiro—

Q. Let me revise that question. Is there anything on that card that shows on three different dates he paid \$10?

A. No, sir.

Q. What is there from the card, itself—what is there that makes you know that he paid three times \$10?

A. This is the corporation's records and not the Trustee's records, and from the payments that were made into this contract by the owners, this was the amount that was received, was deducted for insurance—

Q. Sit down.

A. I thought you wanted me to explain it to the Court.

Q. You can tell us without showing it to us.

A. The first figure shows the amount that was deducted from the \$10 for insurance, and the second payment on

July 18th, 1936, shows the amount that was invested, and also the amount that was deducted for insurance, and then you have the third payment on August 29th, 1936.

Q. Suppose you start with the first payment and tell me from that record when was it paid?

A. June 17th, 1936.

Q. From the amount deducted, which is how much?

A. There was \$1.20 deducted for insurance. There was no money available for investment on the first payment.

Q. You just answer my question; I am going to get to that. From the amount deducted for insurance you know it was a \$10 payment?

A. That's correct.

Q. Why? Sixty cents would be a \$5 payment?

A. Yes.

Q. And \$1.20 is a \$10 payment?

A. That is the first deduction for insurance costs.

Q. What else does it show was deducted?

A. It doesn't show any other deductions.

[fol. 310] Q. How do you know there was no amount available for investment?

A. That was the procedure in connection with the plan, Mr. Shapiro.

Q. Is there anything on that card that tells you that?

A. No. This is simply our record, not the Trustee's record.

Q. I understand that. If I was the person whose card you are holding, and I wanted to know how much of my money was invested from that card, how much would you tell me was invested?

A. From this card?

Q. Yes.

A. I could tell you nothing.

Q. You don't mean you could tell me nothing?

Mr. Irwin: I ask Mr. Shapiro to give him a chance to say what he meant.

The Court: That is all right.

Mr. Shapiro: He understood what I meant.

The Witness: I meant there is nothing to show here.

By Mr. Shapiro:

Q. The card shows there was nothing invested?

A. That is correct.

Q. Why is it? Ten dollars was paid.

A. The set-up of the plan provided that from the first nine payments under a Capital Savings Plan contract, our fee of \$60 was deducted, and also the Pennsylvania Company's fee of 25 cents. That was deducted, if my memory is correct, on the basis of \$8.55 of the first \$10 came to our company, and 25 cents came to the Pennsylvania Company, and if there wasn't any insurance attached to the contract that was invested; if there was insurance, then the cost of the insurance was deducted. In the case of an insurance contract, it left, I think, no money available for investment; [fol. 311] it may be two or three cents, but not enough to make an investment.

Q. For how long would that be? For the first three months?

A. No. In the case of an insurance contract that apparently was only in the first month. I see by this contract there was 23 cents invested in the second month and 24 cents—I mean from the second payment, and 24 cents from the third payment. Of course, the cost of the insurance is a reducing cost as the amount is covered.

By the Court:

Q. How long did that go on? For how many months before the deduction of \$60 was made?

A. Nine months, the first nine months. The heaviest portion of the cost came out in the first three months. \$8.55 was deducted from the first payment.

Q. Out of the \$90 paid in during nine months, assuming there was no insurance

A. There was only \$60 deducted in our company, and 25 cents for the Trustee.

Q. I say on the \$10 a month plan there would be \$90 paid in during nine months, and \$60 would go to Capital Savings, and \$2.25 would go to the Trustee, and then there would be a balance which would be invested.

Mr. Shapiro: \$1.20 would go to the insurance.

The Court: I said in a case of no insurance.

By the Court:

Q. On a \$10 a month plan there would be \$90 paid in during nine months, 25 cents a month would be deducted

for the Trustee, and if the cost of the insurance was added, how much would that be?

A. The cost of insurance, you mean?

Q. Yes.

A. The cost of the insurance was reduced. When we first started to sell the insurance, it was a dollar per thousand per month on the unpaid balance; then it was reduced [fol. 312] by the insurance company to eighty-two cents, and then it was reduced to seventy-two cents. I don't know just when the reduction took place, but the cost of the insurance would be based on the prevailing cost of the insurance at the time the deduction was made covering the unpaid balance of the contract. So, we will assume that \$1.20 was deducted at this particular time; that would be insurance covering \$1190 at a dollar per thousand per month. That would be \$1.20, wouldn't it, or \$1.19.

By Mr. Shapiro:

Q. Did it decrease with each payment because they insured ten dollars less?

A. Yes.

Q. So, your insurance was only an insurance against the payments?

A. Insuring the unpaid balance of the contract.

Q. The insurance was never more than \$1200, was it?

A. Correct, sir; never more than \$1190.

Q. Never more than \$1190?

A. That's right.

Q. That is all you insured?

A. That's right.

By the Court:

Q. Would it be fair to say the average payment in those nine months on the insurance premiums would be about a dollar a month, or \$9?

A. I think that would be a fair estimate, yes.

Q. That would leave about \$18.75 in cash to be actually invested over that nine months' period after deducting your \$60 service fee and \$2.25 for the Pennsylvania Company charges?

A. It would be about twelve, sixty plus six, sixty-six.

Q. You said a dollar a month, which would be \$9.

A. Yes.

Q. \$69, and nine times twenty-five would be \$2.25.

A. Yes.

Q. Which would leave \$18.75.

A. Yes.

[fol. 313] By Mr. Shapiro:

Q. When the money was paid to the Pennsylvania Company, it came to you from the Pennsylvania Company afterwards? How did it get to the Capital or the Independence Company?

A. You mean our commission?

Q. These charges that you made here outside of the insurance.

A. The only part of the ten dollars that we got, Mr. Shapiro, was our service charge.

Q. What happened to the insurance money?

A. The Pennsylvania Company paid that to the insurance company for the coverage.

Q. The 25 cents the Pennsylvania Company kept for itself?

A. That's correct.

Q. And then they sent you a check for your charge of what? What was it?

A. \$8.55, I think it was, wasn't it, on the first \$10?

Q. \$8.55, yes; \$8.55 for the first month, \$8.55 for the second month, \$8.55 for the third month, \$6.55 the fourth month, and \$6.55 the fifth month?

A. That is the schedule in that respect.

Q. What was that charge for?

A. I beg your pardon?

Q. How did you arrive at \$8.55? Oh, that is the \$60?

A. That is the way the \$60 was deducted.

Q. What happened to this man's insurance?

A. What happened to it?

Q. Yes.

A. I believe it lapsed in his case because he didn't make his payment within a period of ninety days.

Q. Did you have insurance for him?

A. Yes.

Q. Can you produce the contract? Is it here?

A. The insurance policy?

Q. Yes.

[fol. 314] A. There is only one policy, that is the master policy in the possession of the Pennsylvania Company.

The individual got a contract certificate in a yellow form, gold form or orange form, which contained the insurance clause, the statement he was covered under the company's —the Connecticut General's group policy which covered all the people who exercised the option of the Capital Savings Plan contracts, the insurance option.

Q. Do you know when he died?

A. I do not.

Q. Is there anything in your records to show when he died?

A. I would think so. I think there was some correspondence about that between the treasurer's office and the Burdettes.

Q. When did you issue such a certificate? Do you have a copy of it?

A. We don't have a copy of the certificate, no sir. The application that Mr. Burdette signed which would have covered the insurance feature, the original application is in the possession of the Pennsylvania Company.

Q. Was there a custom that moneys could be paid to agents, these \$10 payments could be made to agents?

A. As a matter of convenience to contract holders, if they desired to do that, it was done.

Q. Then the company settled up with the agents periodically?

A. Oh, no. The payments received by the agent from a contract holder were turned into the Pennsylvania Company either direct by the agent or through our office.

Q. Was there a custom that the Pennsylvania Company would accept these payments in a lump from the agent when they collected, and the agent would get it from a half a dozen or more people, and then make a payment to the Pennsylvania Company periodically?

A. With the pass books of the individuals, and the Pennsylvania Company would enter, and make the entry of those payments in the pass books of the contract holders.

[fol. 315] Q. At the time the Pennsylvania Company received the money?

A. Yes.

Q. Was there a question in this case about the fact that this man had paid his money to an agent who had not yet turned it over to the Pennsylvania Company?

A. I wouldn't say that, Mr. Shapiro. There was some correspondence in regard to Mr. Burdette's insurance, but I am not familiar with it.

Q. Who has the correspondence about it?

A. I don't think it is here. I think it would be in the files of the company at 1518 Walnut Street, if we have it, or in the possession of the Pennsylvania Company.

Q. What does this stamp on the bottom mean?

A. I can't answer that, Mr. Shapiro.

Q. You can't answer that?

A. No.

Q. Don't your records show that this man died on November 30th, 1936, and that as late as May, 1937, you were still asking payments from this man?

A. Do our records show that?

Q. Yes.

A. I don't know, Mr. Shapiro.

Q. That record isn't here?

Mr. Bohlen: What isn't here?

Mr. Shapiro: I am not asking you. Does the company have the file of Mr. Burdette here?

Mr. Irwin: We were not asked to have it here.

Mr. Shapiro: No, I am not criticizing you.

Mr. Irwin: I will find out.

By Mr. Shapiro:

Q. Here is an envelope; don't pay any attention to these notations on it. Here is an envelope from your company dated May 14th, 1937, addressed to Mr. Burdette. That comes from the Capital Savings Company, doesn't it?  
[fol. 316] A. That certainly is our envelope.

Mr. Shapiro: I would like now to call at a convenient time on the company to produce a copy of the letter that was contained in the May 14th, 1937 envelope.

Mr. Irwin: If your Honor please, we have nothing to conceal, but to ask us to give him a letter that was in that envelope—it may have been just a formal notice we sent out to all the plan holders.

The Court: If it was a formal notice, you say it was a formal notice. If you don't have it, you say so.

Mr. Irwin: I think it is an unreasonable demand.

The Court: There is nothing unreasonable about it. You consult your files; if it isn't there, it isn't there. Isn't this a case where the young lady testified the insurance instead of being paid to her mother or to the estate was paid over to the Pennsylvania Company?

Mr. Shapiro: No; in addition to that, she testified her family was to get the insurance and never got the insurance. The money was never paid over to the Pennsylvania Company; the payments that were made were never paid over to the Pennsylvania Company.

By Mr. Shapiro:

Q. You have not been able to answer?

A. I can't answer, Mr. Shapiro.

Q. Who could?

Mr. Irwin: If your Honor please, he doesn't know who can answer the questions.

By Mr. Shapiro:

Q. Can you give me—

The Court: Mr. Irwin, can't he say so? Mr. McCown can answer these questions. I must say again that the witnesses [fol. 217] who are being called here are all, it seems to me, highly intelligent. They know what they know, and they know what they don't know, in a sense. Let them answer it. If any witness feels he is being asked an unfair question, he can address himself to the Court. I don't think that we need any intervention by counsel on either side to assist witnesses; or to come to their rescue. Don't you have any hesitancy; if you don't know, tell us that you don't know.

By Mr. Shapiro:

Q. Who would be able to answer?

A. Someone in the treasurer's office.

Q. That is what I want to know. Are you able to tell me how long after a failure to pay a premium that the insurance lapses?

A. Ninety days.

Q. Ninety days from what?

A. Just a moment, Mr. Shapiro, I may not be correct on that, whether it is ninety days—for instance, if a person makes a payment for the second payment and then fails to make a payment within a period of ninety days, then I think their insurance lapses.

Q. Where would I find that out in writing? Is there some kind of a contract that shows that? From where did you get that information?

A. The policy, the Connecticut General Life Insurance Company's policy covering the people insured. The Capital Savings Plan contracts allows for a grace period of thirty days, and it has always been the policy of the company to extend an additional grace period of sixty days, during which time the company could pay the insurance plan as an additional service to the contract holder.

Q. How do you figure the thirty days or the sixty days?

A. I don't know, that was figured before—

Q. I don't mean how you arrive at it, I mean from what point does the thirty days begin? Apparently payments [fol. 318] were made in June on the first, sometimes on the seventeenth, sometimes on the fifteenth; when did the thirty days begin?

A. The date the contract was issued, the date that the payments are due. For instance, if the contract was issued on the seventeenth of the month the next payment on that contract would be due on the seventeenth of the following month.

Q. Isn't it true that what you did in order to take care of that was that the company, itself, paid the two months' premiums, advanced the two months' premiums by authorizing the payment of it to the insurance company, or don't you know that?

A. I don't know exactly what the operation was.

Q. Who would know that?

A. Someone in the treasurer's office.

Mr. Shapiro: I ask that this card be marked for identification; it was produced by defendant, and I suppose you want it marked with your number.

Mr. Irwin: Are you going to offer it?

Mr. Shapiro: I may. It doesn't make any difference to me.

Mr. Irwin: You better keep it within your list of exhibits.

Mr. Shapiro: Mark it with my next number.

(The card of John A. Burdette on the contract No. A-10621 was marked Plaintiffs' Exhibit No. 78 for Identification.)

Mr. Shapiro: Mark this envelope that has been identified.

(An envelope addressed to Mr. John A. Burdette was marked Plaintiffs' Exhibit No. 79 for Identification.)

[fol. 319] Mr. Shapiro: Mr. Porteous, recalled, was asked whether it is not true United States Steel Corporation didn't pay a dividend in 1938, and he says that is correct.

J. T. BALANOS.

Cross-examination.

By Mr. Shapiro:

Q. You are not now employed by Capital Savings or Independence Trust Shares, are you?

A. I am employed, yes.

Q. You are employed by them?

A. Yes, sir.

Q. As what?

A. As a general agent or distributor.

Q. Does that authorize you to employ other people?

A. Yes, sir.

Q. Your contract?

A. Yes, sir.

Q. Give me the names of the persons you employed under that authority.

A. Under the Capital Savings or Independence Shares?

Q. Either one, please.

A. All the people under my employment?

Q. Give me the names of them, I say.

A. The active ones or the inactive ones?

Q. All of them that you employed from the time you went in the employ of the company; give me the names of them.

A. There is, first, Miss Angelo, Miss Endoslow, Miss Kirkpatrick, Mr. Camp, Mr. Miller, Mrs. Irene, Mrs. Wilkins, Mrs. Merrill; thirteen, all told.

Q. How many were with you from the beginning?

A. From the beginning?

Q. Yes.

[fol. 320] A. I didn't employ all of them directly; they worked under me. Some of them were handed over to me from the home office.

Q. When did you become a general agent?

A. In 1936. You have the contract.

Q. Just answer the question.

- A. All right.
- Q. What part of 1936?
- A. I don't know just exactly; I think in the fall of 1936.
- Q. Were you employed before that?
- A. I was a sales person since 1933.
- Q. All right. Under whom were you—
- A. I worked under the home office, Philadelphia.
- Q. The home office in Philadelphia?
- A. That's right.
- Q. What was your husband doing in 1933 up until now?
- A. He wasn't doing anything.
- Q. He had no employment at all?
- A. No regular employment.
- Q. No regular employment; what irregular work was he doing?
- A. He tried insurance for a while.
- Q. What else?
- A. I can't remember that he did anything else.
- Q. He didn't, by any chance, work under you, under your general agency?
- A. Positively not.
- Q. Never had anything to do with it?
- A. No, sir.
- Q. Nothing whatever?
- A. Other than my bookkeeper.
- Q. Oh, he was your bookkeeper?
- A. When I became a general agent he stayed home and kept the books, that is true.
- Q. He stayed home?
- A. I have a sub-agent in my own home, yes.
- [fol. 321] Q. What do you mean, you have a sub-agent?
- A. I have an office in my apartment.
- Q. Who is in the office that you have there?
- A. I am the agent there.
- Q. You said something about, "I have a sub-agent in my own home;" I want to know what you meant.
- A. That is a branch. I am simply an agency working under the Philadelphia office, that is all.
- Q. And you had an agency in your home?
- A. That's right.
- Q. Your office was with the company?
- A. My office was in my home.
- Q. And your husband kept your books?
- A. He kept the books.

Q. What kind of books did you keep? What did he have to do? What books did he keep for you?

A. Simply the payments that came in from time to time, the delinquents, the ones that were up to date.

Q. Agents' commission, by any chance?

A. Agents' commission?

Q. The money you paid out to the agents, did you have any record of that?

A. I don't pay anything out to the agents.

Q. When you employed sub-agents, didn't you pay them?

A. No, sir.

Q. All the money you made as commission's belonged to you?

A. That's right.

Q. What were those commissions based on?

A. On production.

Q. I mean what is the basis of it? How much did you get, and on what basis?

A. I got \$40 on each \$10 unit purchased.

Q. No matter who sold it?

A. I sold them all.

Q. What about these agents?

[fol. 322] A. Oh, my agents; I had an overwriting on them.

Q. Did you get any commission on what they did?

A. An overwriting.

Q. What was it?

A. \$10 on each \$10 unit.

The Court: What did they get?

By Mr. Shapiro:

Q. What did they get?

A. To begin with, they got \$25 a unit until they sold fifty units, then they got \$30. I got \$15 when they got \$25, and I got \$10 when they got \$30.

Q. You had thirteen people?

A. That's right.

Q. Those thirteen people got how much for each contract they sold?

A. They got \$25 until they had sold fifty units, and then they were increased to \$30. In other words, I got \$15—

Q. Just tell me what they got. First, while they were getting \$25 and they were working through your agency, how much did you get in addition to the \$25 they got?

A. I got \$15.

Q. \$15?

A. Yes.

Q. When did you get your \$15, and when did they get their \$25? At what stage of the proceedings did they get it?

A. Well, I didn't get anything until after they had gotten theirs out.

Q. When did they get theirs?

A. They got \$5 for each \$10 payment from the first five payments.

Q. In other words, as a result of a \$10 contract and a \$10 payment they got \$5?

A. That's right.

Q. Did you get a portion of that monthly?

[fol. 323] A. No, not until they had gone beyond theirs.

Q. After they had gone beyond theirs, you came in for \$15, first?

A. No, this was taken out of the first nine months, so it took me between the fifth and ninth month to get mine.

Q. When you sold contracts you got \$40?

A. That's right.

Q. How did you get that money?

A. I got \$5 on each \$10 that was brought in.

Q. If it was a \$5 contract, you got \$20?

A. I got \$2.50.

Q. Every time?

A. That's right.

Q. But the total was \$20?

A. That's right.

Q. Did you keep a record of the moneys you earned as commissions?

A. He kept a record for me.

Q. He kept a record for you?

A. As best he did.

Q. Where?

A. In my home.

Q. You don't have it? Is it still existing?

A. If you could make his records out, you would be doing good.

Q. Does the record exist?

A. Yes.

Q. What books did you keep?

A. He kept the books.

Q. What books did he keep?

A. Just a bit of this, that and everything.

Q. You never could read it?

A. No, and nobody else could.

Q. When did you find out you couldn't read it?

A. When I took over the books myself.

Q. In the meantime he kept the books for you?

A. He kept the books for me, yes.

Q. What was the purpose in his keeping the books?

[fol. 324] A. What was the purpose?

Q. Yes.

A. I was on the road; he had nothing else to do.

Q. What was the purpose of keeping the record?

A. To know what I was earning from time to time, and what my several people had, and what my expectancy might be.

Q. How long did he keep it?

A. From the time I took over the general agency until I left him.

Q. How much were your earnings the first year he kept the records?

A. I don't know what the first year was; probably \$3000.

Q. Will the records show that?

A. Yes.

Q. How much did you earn the second year? Do you know what it was, approximately?

A. It increased about a thousand dollars every year from the beginning of my association until the present time.

Q. So that the first year was 1933?

A. That's right.

Q. And you say the records will show \$3000, approximately?

Mr. Irwin: Pardon me, Mr. Shapiro, 1936 was the general agency.

Mr. Shapiro: Now, Mr. Irwin, I think she understands me.

By Mr. Shapiro:

Q. The first year was 1933 that you were employed by this company?

A. That's right.

Q. And you say \$3000 represents your earnings for that first year?

A. I don't know exactly what the earnings were. I have my income tax things, I don't know exactly what it was.

[fol. 325] Q. Did you make up your income tax records from those records—

A. Yes.

Q. —which your husband kept?

A. Yes.

Q. How many books were there that he kept?

A. There were no books, they were just sheets of paper he kept.

Q. He only kept it on sheets of paper?

A. Yes.

Q. Do you still have those sheets of paper?

A. I have most of them that I could salvage.

Q. Of course, when you were making the sale, he didn't go with you on any of these occasions?

A. He might have driven along with me on some occasions.

Q. But he didn't sell any?

A. Positively not.

Q. He wasn't in the presence of these people when any of these contracts were sold, was he?

A. Some of these were sold in sociable gatherings; I mean, they were discussed in sociable gatherings. These people he mentioned were all social friends of mine.

Q. What I mean is he never assisted or helped you in the sale of any of these?

A. Positively not. He was interested in the business as well as I.

Q. How was he interested in it?

A. How was he interested in it?

Q. Yes.

A. He was naturally interested in the income of what we made.

Q. No, I don't mean that. What did you mean when you said he was interested in the business as well as you?

A. Naturally, a man and a wife working together—I mean a wife having a business and having a husband, isn't he naturally interested in what she might produce?

[fol. 326] Q. Why did you change that "working together" that you started to say? Why did you drop that?

A. I didn't mean "working together."

Q. You didn't mean it?

A. No.

Q. What did you mean, when you said he was interested in the business?

A. He was interested in what I would get out of the business.

Q. Was he interested in it financially?

A. Naturally, when he had no regular income of his own.

Q. How much was his interest in that business?

A. I don't know what you mean, how much was his interest in that business.

Q. You don't know what I mean?

A. He was naturally interested if I earned \$5000 much more than—

Q. That is not what you said. You said he was interested in that business. I want to know to what extent he was interested in that business.

Mr. Irwin: If your Honor please, I object.

The Court: Objection overruled, exception.

Mr. Shapiro: Will you read my question?

(The question was repeated by the reporter as follows:

"Q. That is not what you said. You said he was interested in that business. I want to know to what extent he was interested in that business.")

By Mr. Shapiro:

Q. How much was his interest?

A. He was naturally interested to see that I produced.

Q. I am not concerned with that; I am not inquiring about his natural interest. I am inquiring about his financial interest. How much was the financial interest that he had? [fol. 327] A. It is very much nicer to live on \$5000 than on \$1000.

Q. How much did you give him?

A. I didn't give him anything.

Q. How much of the money that you earned did you pay over to him?

A. I didn't pay anything over to him.

Q. What was his financial interest, then?

A. Simply his livelihood.

Q. His livelihood?

A. Yes.

Q. When did you give that to him?

A. Provided for him.

Q. How? Cash? Did you give him the cash?

A. No.

Q. How did you provide for him? Check? Did you have a check book?

A. No.

Q. You didn't keep any checking account?

A. No.

Q. How were you paid by the company, cash or check?

A. By check.

Q. What did you do with that check?

A. Cashed the check.

Q. It was made out to you?

A. That's right.

Q. Did you give him any of the cash?

A. No.

Q. You never gave him any of the cash?

A. No, not for his personal use.

Q. I didn't ask that. I said did you give him any cash?

A. I gave him enough money to pay the telephone bills on occasion.

Q. Is that all you ever gave him?

A. I never gave him any for his personal use, no.

Q. Then he had no interest financially in your business, did he?

A. If I clothed him and fed him, he must have had some interest.

[fol. 328] Q. Did you hear him on the witness stand?

A. Yes, I did.

Q. Did you hear him talking about this plan?

A. Yes, I did.

Q. Where did he get that information? From you? He seemed to know something about the plans; where did he get that information?

A. He had a kit, didn't he?

Q. A what?

A. A sales kit.

Q. Where did he get that?

A. He took it from my car.

Q. From your car.

A. Yes.

Q. How long did he keep it?

A. He still has it, unless you have it.

Q. When did he take it?

A. A month after I left him.

Q. When was that?

A. In January.

Q. What year?

A. 1937.

Q. Has he had it since?

A. He has had it since, yes.

Q. Did you get yourself another one?

A. Yes.

Q. Before that did you discuss the plans of this company with him?

A. Well, if I had an agency in there and I had all my literature there, he certainly knew something about the business.

Q. That isn't what I asked you.

A. I don't know what you asked me.

Q. Why don't you pay attention to the question? It will save my voice. Will you read the question?

(The question was repeated by the reporter as follows: .

[fol. 329] "Q. Before that did you discuss the plans of this company with him?"

A. Certainly, I did.

Q. Where did you see Mr. Charles Bashore when you sold him the contract?

A. At his home?

Q. Where is that?

A. Church Farm School, Glenloch.

Q. Was Mr. Balanos with you?

A. Yes, he was with me.

Q. How long did you stay there?

A. I went in there and talked with Mr. Bashore long before Mr. Balanos came in.

Q. I didn't ask you that. I asked how long you stayed there.

A. I stayed the entire evening.

Q. How long did your husband stay there?

A. He was there half the time I was there.

Q. Did you sell Mr. Yarnall?

A. No, not Mr. Yarnall.

Q. Mrs. Yarnall?

A. Not Mrs. Yarnall.

Q. What was the name?

A. Miss Gertrude Yarnall.

Q. Miss Gertrude Yarnall?

A. That's right.

Q. Where does she live?

A. She lives in West Philadelphia at the present time,  
I believe.

Q. Was your husband with you at the time this sale took  
place?

A. She was in my home.

Q. Was your husband there?

A. He was usually there.

Q. Was he there at that time?

A. Yes.

Q. What was this about Ring I heard? Did you sell  
that?

[fol. 330] A. I did.

Q. Was your husband with you?

A. No, sir.

Q. Where was it you sold that contract?

A. A block from my home in Radnor.

Q. Casson, that is another name.

A. Casson.

Q. Did you sell Casson?

A. I did.

Q. Was your husband with you?

A. No, sir.

Q. Where did you sell Mr. Burdette?

A. At his home.

Q. Who was with you at that time?

A. I was there alone.

Q. Who else was there besides you?

A. The family.

Q. What family?

A. The Burdette family.

Q. Who were they?

A. I don't remember just which ones. Mrs. Burdette  
was there, Laura was there, and probably her younger sis-  
ter.

Q. Did you sell the girl, Laura Burdette, a contract?

A. I did.

Q. Did you get all the commission?

A. I did.

Q. Did Laura get any commission?

A. None whatsoever.

Q. What happened to Laura's contract? You sold it; what happened to it?

A. She cashed it in when I left my husband.

Q. What do you mean, she cashed it in?

A. She no longer had the funds to pay for it.

Q. What happened to it?

A. What happened to it?

Q. How did she cash it in?

A. She had no means to keep on paying her contract.

[fol. 331] Q. What happened?

A. She withdrew.

Q. How much?

A. I don't know; she testified the other day.

Q. You were there.

A. I wasn't there at the time she withdrew.

Q. You were with the company, it was your customer; weren't you interested in what she was getting back?

A. It was something like four or five dollars.

Q. That was the first time?

A. Yes.

Q. How much did she get after that?

A. I don't know the exact figures.

Q. You were not interested?

A. Not in Laura Burdette, no.

Q. To whom were Mr. Burdette's payments made?

A. To the Pennsylvania Company.

Q. Did you get any of them?

A. I took them in, yes.

Q. How many?

A. I don't know how many. I think he had three payments in, had he not?

Q. I don't know, I am asking you.

A. I don't know offhand.

Q. Whatever payments were made, were made to you?

A. That's right.

Q. When did you take them in? As of the date you received them, or did you lump them?

A. I didn't lump them.

Q. When did you take them in?

A. Probably the day following the payment.

Q. The day following the payment?

A. That's right.

Q. You never kept them a couple of weeks, or anything like that?

A. No.

Q. When you got these payments, did you enter them on a paper?

[fol. 332] A. I gave him a receipt for the payments.

Q. You gave him a receipt for the payments?

A. That's right.

Q. Did you make a record of it?

A. Why would I make a record of it?

Q. When you received it from the person who paid it, did you make a record in your books?

A. I never made a record until I got my commission from the Pennsylvania Company. I wasn't concerned in the payments.

Q. You had to pay it over?

A. That's right. I gave him a receipt.

Q. And you kept no record for yourself?

A. No, because I had his pass book and he had the receipt.

Q. You had the pass book?

A. Yes, I had the pass book, he had the receipt.

Q. You would put it in the pass book?

A. What?

Q. You received the money—you know, there is no sense in getting angry.

A. It is so idiotic.

Q. I am trying to ask you some questions.

The Court: Just compose yourself and answer these questions. If there is any question that is asked of you that your counsel thinks should not be asked, he will object.

By Mr. Shapiro:

Q. When you got the money, did you keep a record anywhere of the money that you received from the person who paid you, because you were to take it to the Pennsylvania Company?

A. That's right.

Q. I want to know how you would know, what records you would keep to know whether or not you received the money, and from whom.

[fol. 333] A. I had the pass book, and the money in the pass book, which I kept until I went to the Pennsylvania Company.

Q. That is what I asked, whether you put the money in the pass book.

A. That's right.

Q. That was your only identification, wasn't it?

A. That's right.

Q. I gathered from what you said that you were a sales person; as between yourself and your husband, you were the chief person, you knew more about this Capital Savings and he didn't do any kind of work whether in your employment or otherwise.

A. I don't quite follow that. I was first—

Q. Were you there ahead of Mr. Balanos?

A. In the office?

Q. Yes, were you working there in the place before Mr. Balanos?

A. Yes.

Q. Or did he bring you into the picture?

A. No, sir.

Q. You brought him into the picture?

A. No, sir.

Q. What do you mean by that? What do you mean, "No, sir"? You didn't bring him into the picture at all?

Mr. Irwin: If your Honor please, I think "No, sir" is something that anybody can understand, even Mr. Shapiro.

The Court: Do you object on the ground she has answered the question?

Mr. Irwin: Yes.

The Court: I will sustain your objection.

By Mr. Shapiro:

Q. Didn't you bring him into the picture at all? Don't you consider your husband was in this picture at all? [fol. 334] A. No, I don't consider he was in this picture at all.

Q. That is what I want to know. So far as you were concerned, he never sold a contract, or never had anything to do with the sale of any of these contracts?

A. No, sir.

Q. You have no doubt about that?

A. No doubt whatsoever.

Mr. Shapiro: That's all.

By Mr. Irwin:

Q. Mrs. Balanos—

Mr. Shapiro: Could I ask you another question?

Mr. Irwin: Surely.

By Mr. Shapiro:

Q. You might tell us how your husband was named as an employee by you. How did you happen to name him as an employee?

A. Named him as an employee?

Q. Yes.

A. Simply because when I took over the agency someone would have to be there to take care of the telephone, and things of that kind, and rather than take a stranger, I employed Mr. Balanos.

Q. You did employ him?

A. As my bookkeeper, yes.

Q. How much did you pay him?

A. His maintenance.

Q. You didn't tell me that before.

A. I am telling you now.

Q. You are telling me now—

Mr. Irwin: If your Honor please, I submit this woman has already testified she maintained the home, that she bought the food, that she bought—

The Court: I don't recall that she gave any such testimony. As a matter of fact, she said occasionally she gave him some money to pay telephone bills.

[fol. 335] Mr. Irwin: She testified she maintained the home, and she bought the food.

Mr. Shapiro: We will argue the value of this witness' testimony afterwards.

By Mr. Shapiro:

Q. It has been testified you arranged for this policy?

A. That is true.

Q. For \$1000.

A. That is true.

Q. How much did you pay as a premium for it?

A. I paid the full amount.

Q. The full amount?

A. Yes.

Q. How much was it?

A. It was sixty cents quarterly.

Q. And you paid the sixty cents?

A. Yes.

Q. And you told the company that he was an employee, didn't you, or you wouldn't have gotten the policy?

A. Well, I made a special request that they might consider Mr. Balanos as my employee.

Q. As your employee?

A. And try to put him in group insurance. He had no insurance.

Q. You made yourself beneficiary?

A. Absolutely.

Q. And you paid the premium, and you named him as an employee?

A. That's right.

Q. And you say just now he was your bookkeeper, you employed him as bookkeeper?

A. That's true.

Q. Will you tell us how that was? If he was your employee, why did you name him as an employee of Capital Savings?

A. He isn't an employee of Capital Savings.

Q. Why did you name him such?

[fol. 336] The Court: Isn't that a matter for argument?

Mr. Shapiro: I want this witness' testimony, and I want you to see her testimony. I want her to tell your Honor and me in answering my question why she said he was her employee when this contract says he was Capital Savings' employee.

The Court: If you can, answer it.

The Witness: As I say, I requested a special favor of our company to allow me to put him in this group insurance. He had no insurance, and I made a special request, and after some consideration they said they would make an exception to it and allow Mr. Balanos to participate.

By Mr. Shapiro:

Q. You said that. From whom did you make this request?

A. I talked to Mr. McCown about it, and I told Mr. Bonner about it.

Q. They are both Capital Savings people; aren't they?

A. That's right.

Q. Whose employee was he?

A. He was my bookkeeper. He never appeared in any way, shape or form in the books of Capital Savings.

Q. And you never paid him any salary?

A. I never did.

Mr. Shapiro: That's all.

By Mr. Irwin:

Q. Mrs. Balanos, I have here some papers—

By Mr. Shapiro:

Q. While we are waiting for the papers, Mrs. Balanos, when one of your agents sold a contract, whose name appeared on the contract application?

A. Well, the agency was at the top, and then the agent who sold it was underneath.

[fol. 337] Q. So that the person whose name actually sold it was the bottom name?

A. That's right.

Q. Where it said "agent" would be your name, and "representative" would be your representative?

A. That's right.

Mr. Shapiro: While you are looking through the papers, have you Mr. Balanos, application there?

Mr. Irwin: I don't know.

The Court: We will take a five-minute recess.

(Recess for five minutes at 2:50 o'clock P. M.)

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After Recess

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Present: Counsel as before noted.

JANE T. BALANOS, recalled.

Redirect examination.

By Mr. Irwin:

Q. Mrs. Balanos, I show you here photostatic copies of the original applications for these plans; that is, the one

of Joseph M. Casson. Who does that show as having sold that plan?

A. J. T. Balanos.

Q. Who is J. T. Balanos?

A. I am.

Q. I ask the same question regarding Gertrude Yarnall?

Mr. Shapiro: Of course, I should say these documents speak for themselves.

The Court: They speak for themselves; you are going to offer them in evidence, I assume.

[fol. 338] Mr. Irwin: I will offer them in evidence. These are the copies of applications of the various parties that Cosme Balanos said that he sold to and that Laura Burdette said that she sold to. Will you mark those defendants' exhibits with the proper numbers? And I offer those in evidence.

The Court: Any objection?

Mr. Shapiro: No.

(Photostatic copy of application of Joseph M. Casson for contract certificate of Capital Savings Plan was marked Exhibit D-4.)

(Photostatic copy of application of Jane M. Fairweather for contract certificate of Capital Savings Plan was marked Exhibit D-5.)

(Photostatic copy of application of Claribel Huber Ring for contract certificate of Capital Savings Plan was marked Exhibit D-6.)

(Photostatic copy of application of Berthe E. Deloye for contract certificate of Capital Savings Plan was marked Exhibit D-7.)

(Photostatic copy of application of C. Louis Deloye for contract certificate of Capital Savings Plan was marked Exhibit D-8.)

(Photostatic copy of application of Charles M. Bashore for contract certificate of Capital Savings Plan was marked Exhibit D-9.)

(Photostatic copy of application of John A. Burdette for contract certificate of Capital Savings Plan was marked Exhibit D-10.)

(Photostatic copy of application of S. Radner Kromer for contract certificate of Capital Savings Plan was marked Exhibit D-11.)

[fol. 339] (Photostatic copy of application of Arthur H. Sievers for contract certificate of Capital Savings Plan was marked Exhibit D-12.)

(Photostatic copy of application of Mina Sievers for contract certificate of Capital Savings Plan was marked Exhibit D-13.)

(Photostatic copy of application of Miss Gertrude W. Yarnall for contract certificate of Capital Savings Plan was marked Exhibit D-14.)

By Mr. Shapiro:

Q. Will you pick up those eleven photostatic copies of applications that Mr. Irwin has shown you and pick out those that are in your handwriting?

A. Some of them are stamped here.

Q. How many of them are in your handwriting?

A. Six.

Q. Six out of the ten?

A. Yes.

Q. Will you let me have the six, please?

A. This is stamped (indicating).

Q. Now, you have identified Defendants' Exhibits 4, 5, 6, 7, 8 and 9, these six, as being in your handwriting; is that correct?

A. Yes.

Q. You said that numbers 10, 11, 12 and 13 are not in your handwriting; that is correct, isn't it?

A. There is a printed one; the printed one isn't here.

Q. I am asking you about those not in your handwriting, 10, 11, 12, and 13, is that correct?

A. That's right.

Q. In whose handwriting are they?

A. Probably Mr. Balanos' handwriting.

Q. Do you know? You said probably. Do you have any doubt about whether they are in Mr. Balanos' handwriting?

A. They are Mr. Balanos' handwriting.

[fol. 340] Q. They are. They concern the contract of Burdette, Kromer, Sievers, and Sievers again; that's right, isn't it?

A. Yes.

The Court: You mentioned Burdette; is that John A., or Laura?

Mr. Shapiro: J. A. Burdette.  
The Witness: John A. Burdette.

By Mr. Shapiro:

Q. I suppose all but the signature of the application is in the handwriting of Mr. Balanos, that which is not typed or printed?

A. Yes.

Q. The No. 14 which you said had the name Balanos stamped in it says Balanos, Salesman; in whose handwriting is the "Ten" and the dates, the rest of the application outside of the signature on the application?

A. That is Mr. Balanos' handwriting.

Mr. Shapiro: All right. Thank you, that's all.

The Court: What is the name on that?

Mr. Shapiro: Gertrude W. Yarnall.

By Mr. Shapiro:

Q. I show you two applications which are numbered 19989 and 31972, Capital Savings Plan, and ask you whether you can tell me in whose handwriting they are?

A. Cosme Balanos'.

Q. That is your husband?

A. That's right.

Q. And those are his contracts which he purchased, is that right?

A. I purchased for him.

Q. Well, according to the application he purchased them.

A. I paid for them.

[fol. 341] Q. According to the application, he purchased them? Will you answer that.

A. He applied for them.

Mr. Irwin: If your Honor please, I ask Mr. Shapiro not to stand on top of the witness.

The Court: He can't show her the exhibits without being close to her. Will you take your place?

By the Court:

Q. He was a plan holder?

A. He was a plan holder.

By Mr. Shapiro:

Q. That is your husband?

A. That's right.

Q. What is the date of those two contracts?

A. One is March 30th, 1935, and the other is April 15th, 1936.

Q. At that time did you have a general agency?

A. In 1935, I did not; in 1936, I did.

Q. Did you?

A. I believe so, I wouldn't swear to it.

Q. Is there anything on the application that could help you answer that question?

A. General agent, yes.

Q. Which is the one that has general agent on it?

A. Here, April, 1936.

Q. And at the time of the first one, you were merely a representative?

A. Representative.

Q. How long were those contracts paid for?

A. Until I put him out of my home.

Q. Instead of getting mixed up in that, could you give me the date?

Mr. Irwin: If your Honor please—

The Court: That is a proper question.

[fol. 342] By the Court:

Q. It was December, 1936, when you separated, wasn't it?

A. In December, 1936; they were paid up to date until that time.

Q. I know the dates, so you must know it, Mrs. Balanos.

By Mr. Shapiro:

Q. Mrs. Fairweather, you said you placed her contract and your husband had nothing to do with it, is that right?

A. That is correct.

Q. Without getting into those proceedings, is it true or is it not true she came into the divorce proceedings, and testified your husband had sold it?

A. She did not.

Mr. Irwin: If your Honor please, I object to that. I didn't ask anything about divorce proceedings.

The Court: Not today, you didn't.

Mr. Irwin: If he wants to open it up, I have no objection.

By Mr. Shapiro:

Q. You said she had testified to that effect, that he had been the one responsible for her buying the plan?

A. He wasn't in any way responsible.

Q. I said did you hear her testify to that effect in those proceedings?

A. She didn't testify to that effect.

Q. She did not?

A. No, sir.

Mr. Shapiro: All right, that is all I want to know.

Mr. Irwin: That is all. Thank you, Mrs. Balanos.

[fol. 343] RAYMOND McGRAW BRANDRIFF, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Irwin:

Q. Mr. Brandriff, you are employed by the Pennsylvania Company, are you not?

A. I am.

Q. Have you at my request the accounts and records of the plaintiffs in this litigation?

A. I do.

Q. Turning to the account of Robert J. Deckert, how much has he paid in?

A. Eight payments at \$10 each, \$80.

Q. Has he made any withdrawals?

A. No, sir.

Q. Roland W. Randal?

A. Yes, sir.

Q. How much has he paid in? How many plans has he, or plan contracts?

A. He has two.

Q. Two?

A. On B-13415 he made sixteen payments at \$30 each, or \$480; on A-19528, seventeen payments at \$20. each, \$340.

Q. Has he made any withdrawals?

A. He has not.

Q. David W. Compton?

A. Yes, sir; A-6265, fifty payments at \$5 each.

Q. A total of what?

A. \$250.

Q. Has he made any withdrawals?

A. He made two.

Q. What have they amounted to?

A. One on November 2d, 1933, of .19,641 shares, and January 30th, 22.272. I don't have the value of the first one—

[fol. 344] By Mr. Shapiro:

Q. What is that, withdrawal or reinvestment?

A. Withdrawal. The value of the second one was \$55.

The first one doesn't appear here.

By Mr. Irwin:

Q. Were those withdrawals of shares made in kind, or did he direct the sale of them?

A. They were sold.

Q. They were sold.

A. They were sold.

Q. By the Pennsylvania Company?

A. By the Pennsylvania Company.

Q. How much was remitted to him in cash, do you know?

A. \$55 for the second one. This first one is a new card.

Q. Can you figure that out without much difficulty?

A. There is \$50 on here, I think. That is the amount he withdrew on November 2, 1938.

Q. R. G. Cadman?

A. Cadman, A-10660, thirty payments at \$10 each, or \$300.

Q. Any withdrawals on that?

A. No.

Q. James L. Gleason?

A. A-17552, eighteen payments at \$10 each, \$180.

Q. Any withdrawals on that one?

A. No.

Q. Samuel Miller?

A. A-6025, forty-four payments at \$10 each, or \$440.

- Q. Any withdrawals on that?
- A. No.
- Q. Irene R. Randal?
- A. B-7280, forty-six payments at \$10 each, \$460.
- Q. Any withdrawals?
- A. No.
- Q. Joseph Laky?
- A. Thirty payments at \$10 each, \$300.
- [fol. 345] Q. Any withdrawals?
- A. None.
- Q. Abe Zubrow?
- A. Fifty payments at \$10 each, \$500.
- Q. Any withdrawals?
- A. March 8th, 1939, 130.713 Independence Trust Shares were sold. There was remitted to him \$300.
- Q. Has he any balance at all?
- A. He has 8.699 shares of Independence Trust Shares.
- Q. Have you covered all of them, Mr. Brandriff?
- A. Yes, sir.

Cross-examination.

By Mr. Shapiro:

- Q. This last party that you talked about that has 8.6, that is Mr. Zubrow?
- A. Yes.
- Q. I understood you to say he paid in \$500?
- A. That's right.
- Q. Why has he only gotten \$325?
- A. The deductions, service fees.
- Q. What is that?
- A. Service fee, Trustee fee and insurance premium.
- Q. How do you know that?
- A. They are deducted.
- Q. Can you tell that from anything you have?
- A. Yes, we have the amount invested on the card here.
- Q. Can you tell what has happened to reduce his \$500 down to, putting it in dollars and cents, to around \$324 or \$325?
- A. The card shows he made fifty payments at \$10 each.
- Q. Tell the court what was charged against that?
- A. There was a \$60 service charge for Capital Savings; there was a \$12.50 Trustee fee, and I can't say what the insurance premiums were, offhand.

Q: Why? Isn't that given on the record here?

A. We don't show the premiums separately, we only show the amount invested.

[fol. 346] Q. There were ten payments, you say, of \$50 each?

A. Fifty payments at \$10 each.

Q. You have charged \$60, and then you charge the Trustee's commission of \$12; that is \$72.

A. That is correct.

Q. Something else must have come off there.

A. Not necessarily. The shares may have been purchased at a higher value than they were when they were sold.

Q. Do you have the record to show at what price those shares were purchased?

A. No.

Q. Does your company figure up the price at which those were purchased?

A. Yes, in our daily record.

Q. In your daily record?

A. Yes.

Q. Does that show as against this particular person how much?

A. The price doesn't show on this card.

Q. That card doesn't show how much this man paid for those shares, does it?

A. Yes.

Q. What did he pay?

A. It shows the various amounts invested each day.

Q. How many shares did he have altogether when he got through paying?

A. 134.412.

Q. In round figures, we will say 140 shares?

A. Yes.

Q. For how much money?

A. For \$500.

Q. I mean after you took off those two items?

A. I can't say. We don't total it here. We put the payments down individually; we don't carry a running total.

Q. Do you know what the price was for those shares on May 8th that were sold, how much per share?

[fol. 347] A. Yes.

Q. What was it?

A. \$2.31.

Q. \$2.31 a share?

A. Yes.

Q. Do you know what the cost per share was?

A. I do not.

Q. Do you know to whom those shares were sold?

A. To Independence Shares Corporation.

Q. They were sold to the Independence Shares Corporation?

A. Yes.

Q. I thought you sold them on the open market?

A. We sell to the Independence Shares.

Q. You mean when this man sold these shares of stock, to get his money out they were sold to the Independence Shares Corporation?

A. That is correct. They maintain a market for their shares.

Q. How do they do that, and how do you know that? How do they maintain a market?

A. It is a custom.

Q. It is? Tell me about this. Without the custom, tell me about this situation. How do they maintain a market for their shares? How is it done?

A. They buy the shares we have to sell.

Q. Do you have an arrangement with them that they will buy all the shares you have to sell?

A. Not all.

Q. What limit have you placed on it?

A. There isn't any limit. We offer them the shares; if they don't take them, we would have to redeem them through our trust department.

Q. How is the price arranged? Who decides what that price will be?

Mr. Irwin: Give him a chance to answer, Mr. Shapiro.  
[fol. 348] The Witness: They supply us with a make-up sheet showing the price every day.

By Mr. Shapiro:

Q. Who supplies it?

A. Independence Shares Corporation.

Q. Do you have one of those sheets?

A. No.

Q. Are they available?

A. They are available in our office.

Q. What do they show?

A. They show the cost of the shares, the closing price last night plus the accumulations.

Q. Less charges?

A. I can't say offhand; that is, the bid price and the asked price includes 7½ per cent of the market value of the shares plus tax.

Q. Tell me that again, I didn't follow that.

A. The asked price, the closing price of those shares—

Q. Which shares are we talking about?

A. The portfolio shares of Independence; plus brokerage, plus accumulation—I may not be correct on the brokerage, but accumulation plus the value, as near as I can remember.

Q. What I am talking about now is when this fellow Zubrow came and said he wanted his money, or he wanted to sell his shares, you found out how much to give him, or, rather, you sold those shares to the Independence Shares Corporation?

A. That's right.

Q. And before you knew how much you would give him for that stock you had some communication with the Independence Company, is that right?

A. Well, that came in along with others for liquidation.

Q. I understand.

A. We lump the shares, what we have to sell, and we call the Independence Shares and say we have so many, [fol. 349] will you buy them. We put them in their account in escrow and charge them for the price shown on the make-up sheet.

Q. What is the escrow account?

A. It is an account they maintain on our books just to handle the mechanics in buying and selling and liquidation.

Q. That is, the buying and selling of the basic stock?

A. I don't have anything to do with that, that is handled by the trust department.

Q. Do you keep that sheet they sent to you? For instance, if I wanted to know from your bank how that price was arrived at on May 8th, would that sheet be available to me?

A. On March 8th.

Q. Was it March 8th or May 8th?

A. March 8th, 1937.

Q. March 8th, 1937?

A. That's right.

Q. How far back do you keep those sheets?

A. I can't say off-hand.

Q. I would like, if you could, to produce that sheet so that we could have it offered in evidence.

A. We can produce March 8th.

Q. Now, Compton had some withdrawals, is that right?

A. Yes.

Q. You said he withdrew shares; did he withdraw shares or cash?

A. He had to withdraw shares because we held shares, but we had to sell them.

Q. To whom did you sell those shares?

A. Independence Shares Corporation.

Q. In all cases in these withdrawals, they have been sold to Independence Shares Corporation?

A. That's right.

Q. And when were his withdrawals?

A. November 2, 1938, and January 30, 1937.

Q. What was the price on the January 30th shares?

A. I don't have that on this card. This is a number 2 card, and there is a number 1 card which we don't have here. The price on January 30th was 2.56112.

[fol. 350] Q. 2.56?

A. 112.

Q. January 30?

A. That's right.

Q. What was March 8th that you just gave me, the Zubrow?

A. 2.31102.

Q. 2.31?

A. Yes.

Q. And the cost price you don't have?

A. No; I don't have that.

Q. Is that card closed?

A. No, sir.

Q. He still has shares?

A. 2.134 shares.

Q. That is about \$5?

A. About that.

Mr. Shapiro: That's all.

By the Court:

Q. When you say you sold to Independence Shares Corporation from the figures on this make-up sheet, that represented what? The closing price on the previous day?

A. Yes, that represents the closing prices on the previous day. We get that sheet at ten o'clock in the morning.

Q. In the event there are dividends declared between the time of the closing of the books and the dividend date you call that accumulation?

A. That, I think, would be credited on this card.

Q. Against that you charge a brokerage?

A. No.

Q. Assuming there were no dividends, would you sell and charge the brokerage commission, or was that asking price—

A. We merely sold at the bid price.

Q. The bid price reflected the brokerage cost or not?

A. I am not certain about that.

[fol. 351] Q. In other words, I want to know when you sold any Independence Trust shares whether there was a brokerage charge.

Mr. Shapiro: I didn't ask him, Judge, because he was a little hazy on it.

By the Court:

Q. I want to know whether the price represents the closing price on the preceding day plus brokerage or not.

Mr. Shapiro: I don't know whether he means the price mentioned by Independence Shares.

By the Court:

Q. Your bid and asked sheet was bid and asked by the Independence Corporation?

A. That's right.

Q. That was the bid and asked price on the New York Stock Exchange?

A. I am not sure. Some investment trusts include brokerage in bids and some do not.

Mr. Shapiro: That is the reason I asked that he produce a card on this particular one that will explain it.

By Mr. Bohlen:

Q. Mr. Brandriff, I show you a paper headed "Dividend Payment Order" dated March 28th, 1939, and ask whether that is the form or order you received from holders of

Capital Savings Plan contract certificates who desire the remittance of their dividends and distribution?

A. It is.

By Mr. Shapiro:

Q. That, of course, you only get in cases where there is no declaration of trust filed, isn't that right?

A. We get those, and if there is a declaration of trust we ask them to revoke it. We will fill out a form and send it to them.

[fol. 352] Q. You ask them to revoke the declaration of trust?

Mr. Bohlen: Yes, you will find they are revocable.

By Mr. Shapiro:

Q. Why do you do that?

A. Because the declaration of trust states they agree to add income or distribution to the corpus of the trust.

Q. Who agrees to do that?

A. The investor when he signs the declaration of trust.

Q. Then you ask him to revoke that, why?

A. If he wants the dividend remitted.

Mr. Bohlen: I would like to have this letter marked for identification and have the Court's permission to offer a photostatic copy of it in evidence because this is our original record.

The Court: Have it marked for identification.

(A letter was marked Pennsylvania Company Exhibit No. 1 for Identification.)

By Mr. Shapiro:

Q. What about this application which provides the property shall be trustee and reinvested?

A. We abide by the provisions in the declaration of trust. If they don't revoke it we make the check out to them as trustee for.

Q. Who instructed you in that?

A. Our counsel.

Q. Your counsel?

Mr. Bohlen: I think I can explain it.

By Mr. Shapiro:

Q. We ought to have that explained. When was that begun, do you know?

A. I couldn't say.

Mr. Shapiro: Can you tell us?

Mr. Bohlen: I don't know; quite a while ago. In view of the fact that one of the provisions in these declarations [fol. 353] of trust is that the distributions are to be remitted; when a certificate holder wants to get his income for himself personally, it is obvious that he can't get it personally without breaching that trust he has on file with us. In order that the dividend may be remitted to him personally, we require that he revoke the declaration of trust he filed with the Pennsylvania Company.

By Mr. Shapiro:

Q. Does it stay revoked, then, or only for that one time?

A. It is revoked permanently. He has the privilege of reinstating it.

Mr. Bohlen: As I understand it, it is revoked permanently.

Mr. Shapiro: Does Capital Savings Plan have to consent to that?

Mr. Bohlen: Not in my opinion.

Mr. Shapiro: All right. That is all, Mr. Brandriff. Mr. Barba.

Mr. Irwin: If your Honor please, I have at the request of your Honor, prepared income account statements. The first one is for Independence Shares Corporation of Pennsylvania from June 13, 1935, which was the time that that corporation was organized. I am referring now to Independence Shares Corporation, the Pennsylvania corporation. That statement is by years, and attached to which is the operating expenses which are summarized in the breakdown of the operating expenses.

I have also furnished a similar statement for the months of January and February, 1939, which is of the Independence Shares Corporation of Pennsylvania, which, as your Honor knows, is the merged corporation formed by the [fol. 354] merger of Capital Savings Plan, Inc., and Independence Shares Corporation.

I have likewise prepared, or had prepared income statements of Capital Savings Plan from the date that corporation was organized, October 15, 1931, down to date, that is down through 1938. For January and February of 1939, of course, the operations of that company are reflected in Independence Shares Corporation.

I have also prepared at your Honor's request a statement showing the officers of the company and the salaries that they have received from September, 1931, down to February 28, 1939. That statement shows the compensation received from Capital Savings Plan, Inc., and the compensation received from Independence Shares Corporation. I have also included a statement showing the commissions received by them on personal sales of contract certificates where they negotiated and made the sale, so that that will show completely everything that they have received either from Independence Shares Corporation of Pennsylvania or Capital Savings Plan, Inc.

If your Honor please, this detailed information which we have furnished, of course, gives the complete story of our business. I do not want to offer it in evidence. If your Honor wants it, I do not object to furnishing it to your Honor.

The Court: Why shouldn't it be in evidence?

Mr. Irwin: I don't think it is incumbent on me to produce and offer in evidence the salaries of our officers. I do not think that the operating statements of the company are relevant to this extent, sir, that the question as I see it on insolvency is whether we are solvent or insolvent now, depending on our assets and liabilities.

The Court: It is more than a question of solvency or insolvency where there is a question of receivership. It goes to the question of management also.

[fol. 355] Mr. Irwin: I don't think this is a stockholders' bill. I have no objection. I have furnished it. I have put it in tabular form. I have tried to make it available to your Honor in a way that would be easiest for you to analyze it.

I have already sent to your Honor a copy of our balance sheet as of February 28, 1939, and I don't know whether that is officially a part of the record, or not, but I think it should go in certainly with this data, if your Honor wants to have it as part of the record.

The Court: I will direct that the financial statement which was submitted by you as well as these statements, that is, profit and loss statements and these various papers which I requested, be given to the stenographer and be marked for identification and to be placed in the record and made part of the record in this case.

Mr. Irwin: Very well.

(A paper entitled "Income account Independence Shares Corporation (Pennsylvania) (From June 13, 1935 to December 31, 1938)" was marked Defendants' Exhibit 16.)

(A paper entitled "Operating expenses Independence Shares Corporation (Pennsylvania) (From June 13, 1935 to December 31, 1938)" was marked Defendants' Exhibit 17.)

(A double sheet entitled "Income Account Capital Savings Plan, Inc., from October 15, 1931 to December 31, 1938" was marked Defendants' Exhibit No. 18.)

(A double sheet entitled "Operating Expenses Capital Savings Plan, Incorporated (From October 15, 1931, to December 31, 1938)" was marked Defendants' Exhibit No. 19.)

(A sheet entitled "Income Account Independence Shares Corporation (Pennsylvania) for January and February, [fol. 356] 1939," was marked Defendants' Exhibit No. 20.)

(Eleven papers entitled "Officers' Compensation were marked D-21 to D-21j.)

Mr. Irwin: If your Honor please, in my letter to you of April 5th in which I enclosed a copy of the balance sheet, I offered an explanatory statement with regard to this item of contingent liabilities. In case your Honor is not familiar with, or does not recall what I am referring to, I would suggest that that also be made a part of the record.

The Court: You made the statement that there was a contingent liability of \$3,486,000.

Mr. Irwin: No, I said in all these companies, all these plan companies, as a result of the S. E. C. ruling and investigation, there is an item of contingent liability in the amount contained in the prospectus of these similar companies.

The Court: In your case it is \$3,486,000. plus an approximate additional one-half million.

Mr. Irwin: \$3,486,000—

Mr. Barba: I thought it would be minus one-half million.

The Court: According to your statement of February 28th—

Mr. Irwin: I am referring to the fact that this same course of procedure regarding contingent liability—

The Court: What does the contingent liability mean?

Mr. Irwin: Contingent liability means that if everybody who bought and paid for shares from us, on the payments [fol. 357] they made to us, that, if they sue us and they recover from us then they would be able to establish a liability. It means nothing more than that. It was installed or put in there. As far as an actual liability, it means no more, in my opinion than such an item would appear in a statement of Morgan, Stanley. In other words, under the law, as I conceive it, under the S. E. C. law, every person who sells a security has a contingent liability within a certain time that they may be sued.

The Court: How would that operate?

Mr. Irwin: Which one?

The Court: You have an approximate three and one-half million dollar contingent liability—

Mr. Irwin: I can best illustrate the actual operation for your Honor—is my letter there?

The Court: Yes.

Mr. Irwin: —by stating that from June 14, 1938 down to the present date the amount paid on account of that contingent liability is \$279.34.

The Court: Assuming it was more, assuming for the sake of argument that the plan holders could successfully maintain suits and recover judgment against the Independence Shares Corporation—

Mr. Irwin: Of course, if your Honor please, I can't go along with you on the assumption that they could.

The Court: Well, assuming they could.

Mr. Irwin: Assuming that they could, then they would establish a claim against Independence Shares Corporation in the amount of their particular claim, which would depend on the amount that they had paid, and the present value of the shares.

[fol. 358] Understand, if your Honor please, that this \$3,486,000 does not reflect any claim for any shares of stock.

The Court: I understand that, they couldn't have the penny and the cake, too. They would have to turn their stock over to you.

Mr. Irwin: Right. As to your question, I couldn't say. You have asked me a hypothetical question. I couldn't answer that without taking it as of a date, say as of today's date and fixing the value of those shares which would be offset against them. We do know that from our experience and from the number of claims that have been made and from the number of payments that have been granted, that this so-called contingent liability is more theoretical than real.

The Court: Isn't it something that is put on the prospectus to make the prospectus inviting to the plan holder or prospective plan holder to say that this company is contingently liable?

Mr. Irwin: No, it is not. If your Honor please, we didn't put that on; the only reason it was put on here is because the—

The Court: To comply with the requirements of the Securities Act.

Mr. Irwin: —because the S. E. C. required that of every similar company.

The Court: Assuming there was a three and a half million dollars of a contingent liability, assuming that you had suits brought against you and that there was a recovery, assuming you had say four million dollars worth of stock in the custody of the Pennsylvania Company applicable to the satisfaction of those claims—when I say four million dollars, I mean of a cost of four million dollars—and at the time it [fol. 359] was required to satisfy those judgments the market value of that stock would be under three and a half million dollars, or anything less than four million dollars, how would you satisfy them? You have contingent liabilities of three and a half million. Suppose you could convert or sell the shares which are now in the plan say for \$3,250,000; that really is not beyond imagination, in view of the sharp decline we have had in the stock market the last month or two months.

Mr. Irwin: I can only say this to your Honor, that as I have already said, that the actual amount paid out was \$279.34, and we have had a general decline in the market for the last six months. Everyone has been apprised and advised of this.

The Court: I am not saying there is any concealment. You don't understand me. I am not charging any misconduct on the part of the company.

Mr. Irwin: I know that, sir, but I say this to you, we must judge these things in the light of our experience—

The Court: May I interrupt you a second?

Mr. Irwin: Yes, your Honor.

The Court: You sold \$762,000 of your securities for \$662,000. As a result, there was a loss of approximately \$100,000. In addition to that, there was the reinvestment of a given portion of that \$662,000, there was a seven-and-one-half per cent overwrite approximating another \$35,000, so that the stockholders or plan holders had put back in their portfolios securities of a value of approximately \$135,000 less than the securities that were there before they were sold. Do you follow me?

Mr. Irwin: Well—

The Court: Do you just follow that part of it?

[fol. 360] Mr. Irwin: Let me point this out to your Honor. The first part of your proposition that the cost of these securities was \$100,000, but the value was not \$100,000 greater than the value at the time they were sold—

The Court: They were charged \$762,000 for them.

Mr. Irwin: That is the cost.

The Court: That was the value of their property.

Mr. Irwin: The value of their property was the value as of the date that these securities were sold.

The Court: I am speaking of the \$762,000 that was paid by the plan holders for these securities, according to the statement you have made. That is at the time these seven securities were taken out of the portfolio.

Mr. Irwin: \$763,655.33 and \$652,000 were the figures I gave your Honor.

The Court: I was keeping it in round figures, I said \$763,000. Was that the cost of the securities to the plan holders?

Mr. Irwin: That was the cost of the underlying securities that were sold.

The Court: Cost to whom?

Mr. Irwin: Cost to Independence Shares Corporation.

The Court: Then that is not what I asked for. I asked what the price was, the aggregate at which the securities were put into the portfolio.

Mr. Shapiro: That was even more.

Mr. Irwin: They were put in at \$763,655.

[fol. 361]. The Court: Let us agree on it. They were put in the portfolio at \$763,000?

Mr. Irwin: I want to point out to your Honor that that money, that represented the total cost of these securities for Independence Shares Corporation which sold shares not only to plan holders, but shares were sold to others.

The Court: Who were the others?

Mr. Irwin: They were people who bought Independence Trust Shares independently. Independence Trust Shares were sold in the open market.

The Court: Whether you call them plan holders or anything else, someone held them and they paid \$763,000.

Mr. Shapiro: Plus commissions.

The Court: I don't want to get into such details. I think, according to my understanding; that \$763,000 was the complete cost reflecting whatever underwriting there may have been, seven and a half or nine per cent, and reflecting the cost of the brokerage in the purchase of the stock. Is that correct?

Mr. Irwin: I would rather ask Mr. Geary about that.

Mr. Shapiro: If you will look at the books, you will see it says that is the cost of the stock that was bought, then Independence Shares of course added \$763,000 plus seven and a half plus commission.

The Court: Perhaps I misunderstood it.

Mr. Shapiro: That's what it was.

Mr. Irwin: That is the cost at the time of the deal.

The Court: Cost to whom?

Mr. Geary: Cost to the depositor corporation.

[fol. 362] Mr. Irwin: Independence Shares Corporation.

The Court: What was the cost to the plan holder?

Mr. Shapiro: Even more.

Mr. Geary: The market price on the day of purchase.

The Court: What was it?

Mr. Geary: It may be more or it may be less.

Mr. Shapiro: The market price plus the charges.

The Court: I wasn't given, then, what I asked for.

Mr. Irwin: Your Honor please, it was the cost that these securities went in.

The Court: That is just what it is not, according to your prior statement.

Mr. Bonner: It is practically impossible to figure it. This cost, I might say, is figured for income tax purposes. It

was necessary to set that up at the request of those officials. It is on the basis of first shares in, first out.

The Court: Let me find out about this. Is \$763,000 the cost of these seven securities to Independence Shares Corporation before they went into the portfolio of the plan holders?

Mr. Bonner: No, sir, it is the market value of the securities as of the date the trust shares were issued against them.

The Court: Doesn't that mean the same thing? Doesn't that mean the cost at which they went into the portfolio?

Mr. Bonner: No, there may be a difference between the cost on the day they are acquired and the day they are deposited—

[fol. 363] The Court: I thought they went in at the market value of the day before. That's what was said.

Mr. Bonner: They are sold to the investor at the closing price. The investor pays that.

The Court: What is that \$763,000? Is that the price at which they were sold to the investor?

Mr. Bonner: That is the price of the stock on the day when the underlying securities were deposited with the Pennsylvania Company.

The Court: That means then it was the cost to the investor.

Mr. Bonner: Not necessarily.

The Court: What is it?

Mr. Bonner: The cost to the investor would be the price plus the mark-up of seven and one-half per cent.

Mr. Shapiro: Plus the increase in price. If the price went up or if it decreased—

Mr. Bonner: That's right.

The Court: Well, now, what is it?

Mr. Bonner: That is the cost plus—

The Court: We know seven securities were sold and they yielded \$662,000. We know that.

Mr. Bonner: Yes.

The Court: Therefore the plan holders and others—when I say "others" I mean others than Independence Shares Corporation—they sold what they had for \$662,000. Is that correct?

Mr. Bonner: Yes.

The Court: What did that cost them?

[fol. 364] Mr. Bonner: The only cost figure that has ever been compiled is \$763,000.

The Court: It may be more than \$800,000, is that correct?

Mr. Irwin: No, it couldn't.

Mr. Shapiro: Seven and a half per cent of \$763,000 is at least over \$40,000, close to fifty-five or sixty. That cost alone was added to anyone who bought.

The Court: Is that right or not?

Mr. Bonner: That is possible.

The Court: There was the write-up on the \$763,000 of at least 7½ per cent, wasn't there?

Mr. Bonner: Yes, that would be correct.

Mr. Shapiro: And nine, depending on when they were bought; maybe nine; under the Capital Savings Plan—

The Court: That would be \$57,000. I am taking the 7½ per cent figure. That would be an overwrite of \$57,000.

Mr. Bonner: All right.

The Court: And \$763,000, that would be a cost of \$820,000 to the plan holders. Isn't that correct?

Mr. Bonner: Yes, sir. I agree with your figures.

The Court: I don't want to lead you to make an erroneous statement.

Mr. Bonner: This cost figure is an accountant's computation. There is no way to get the exact cost. You add the shares that were outstanding at the end of the business day for income tax purposes; this cost was calculated on the basis of first shares in first out.

[fol. 365] The Court: That \$763,000 was the cost to the Independence Shares Corporation on the day when the stock went into the plan holders portfolio.

Mr. Bonner: On the basis of first shares in first out.

The Court: Therefore the plan holders would have to pay the 7½ per cent to get it from the Independence Shares Corporation to their own portfolio.

Mr. Bonner: Yes.

The Court: That would make it \$57,000 plus \$763,000, or about \$820,000.

Mr. Bonner: Yes.

The Court: And the plan holders received \$662,000 when the securities were sold.

Mr. Bonner: That is correct.

The Court: That is a difference of approximately \$158,000. When these seven securities were sold what propor-

tion—that was \$820,000, the cost at which they went into the portfolio. The portfolio at that time contained stock at a cost of what to the plan holders? In the neighborhood of \$4,000,000, was it?

Mr. Bonner: Yes, I would agree, your Honor, at the time of the sale; over \$4,000,000, I would say four and a half million dollars.

The Court: That would be approximately 20 per cent of the money value of the portfolio was sold?

Mr. Bonner: Yes, I believe so.

The Court: In the event it was all sold there would be a loss, if they had all been liquidated at that time, there would be a loss of five times \$158,000?

Mr. Bonner: Not necessarily.

[fol. 366] The Court: Assuming they all had been sold at that time.

Mr. Bonner: Assuming the losses on the remaining securities would be equivalent to the loss on the seven in proportion?

The Court: Assuming that.

Mr. Bonner: Each security can be calculated separately.

The Court: That would be a loss of \$790,000; five times \$158,000 would be \$790,000. I understand that there are variable factors, it is likely—I won't say that, strike that out—it is possible that the other securities may have been sold at a profit and not at a loss, but assuming that what happened in the case of these seven securities, that the same facts were true with regard to the remaining thirty-five securities that were retained, assuming that the same loss would have happened in the sale of those thirty-five securities as was in the case of the seven securities that were sold, you would have had a loss of \$790,000. Do you follow me?

Mr. Bonner: Yes, sir.

The Court: Assuming that that had happened, what would your contingent liability mean if you had stock of a market value of \$800,000, approximately, less than the cost, and assuming you had judgments against you and you would then take that stock over and you would have stock worth \$800,000 less than cost, what would the contingent liability mean in that case?

Mr. Irwin: If your Honor please, your Honor makes assumptions, and of course, if you want to assume, you can assume based on the report of Mr. Porteous which he furnished in January of 1939, the securities had a greater

[fol. 367] value, the underlying securities had a greater value than the cost of them.

The Court: I am also familiar with the fact that since February when the computation was made as to the market value of the securities that there had been a considerable decline in the stock market. That situation no longer holds true, although the values given by Mr. Porteous in his computation were true at that time, they are not true today.

Mr. Irwin: But I think that we can assume, for the purpose of experience, that the securities that we sold here, and for the reasons that they were sold, probably declined far more in market value than the other securities.

Mr. Shapiro: That is not so.

The Court: Won't you let me get one thing clear in your mind? I am not making any criticism of the sale of the seven securities which were sold, either as to the method of selection of these particular securities—I have no criticisms to make. That was in the exercise of the best judgment of Mr. Porteous and best judgment of the directors of the corporation. Assuming that—I am discussing the situation from this standpoint, if the same thing happened to all the securities, what would be the result as far as the planholders were concerned? Let me take the particular securities which were sold at a loss of \$158,000. Assuming that your other securities left in the portfolio were sold exactly at cost, their value today was exactly what they cost, there would be a loss of \$158,000 of the total amount of the investment, is that correct?

Mr. Irwin: There is a loss of \$100,000—

The Court: \$158,000.

Mr. Irwin: By reason of the reinvestment of that money, they pay in addition \$35,000 or whatever that amount is. [fol. 368] Mr. Geary can tell you. Seven and a half per cent—

The Court: \$57,000.

Mr. Irwin: \$57,000. But that \$57,000, we are not entitled to a penny of that if they direct that they want to receive their money in cash, and some of them—

The Court: We are discussing two different things. I am not taking into account the 7½ per cent which was charged on the reinvestment of the \$662,000. If I did that my \$158,000 figure would be swelled by some \$35,000 additional. I am not doing that. The 7½ per cent is only taken

into consideration where it is actually applied, that is, in the case of the investment of the \$763,000.

Let me tell you what I am getting at. There was a loss taken, assuming that the \$663,000 had been dispersed in cash, that there is a loss of \$158,000; assuming that the rest of the securities, of the thirty-five securities in the portfolio had the same market value today as the cost price to the investor, you would have a loss of \$158,000. You would have to pay out \$158,000. You would have to pay out \$158,000 if these people got judgments against you. How would you get that \$158,000? What would your contingent liability mean in the case of a corporation that has, according to its statement, \$84,000 as your total assets position, of which \$37,000 is good will, leaving a balance of \$47,000 in assets, assuming that those assets were reliable at one hundred cents on the dollar? What would your contingent liability mean?

Mr. Irwin: Our contingent liability means this, that before anybody can recover they must show that they come within the purview of the Securities and Exchange Act.

[fol. 369] The Court: That is not the answer.

Mr. Irwin: Let me finish.

The Court: I am assuming that they obtain judgment.

Mr. Irwin: If you are going to assume that these people obtain judgment, you ask me how am I going to pay \$158,000 with \$40,000. I can't do it, nor can anyone.

The Court: All right.

Mr. Irwin: But I say that you can't just assume that when in the light of the experience of this company, this liability, ever since it has been in effect, since June 14, of 1938, that in that time we have paid out \$279 and we have no suits pending other than this present suit, and I don't think your Honor can assume that. Your Honor is asking me to assume those things which I know from my experience and from my judgment are theoretical, because your Honor must realize that if people were dissatisfied with those things, if people felt that they had not been treated properly they would not have continued to pay and to pay and have continued to pay after notice of this thing. They all had notice of this suit; they all received copies of the new prospectus.

The Court: You and I are talking about two different things.

Mr. Irwin: Yes, but I want to get out of your Honor's head, if I can, the fact that this is a contingent liability doesn't necessarily establish it as an actual liability. Your Honor asked me—

The Court: Of what value is a contingent liability to a plan holder, or what you said is a contingent liability on the part of a company with assets of \$47,000, or net assets of [fol. 370] \$37,000 where you have a contingent liability of \$3,486,000?

Mr. Irwin: Every security dealer in the United States has a contingent liability equal to the amount of securities he sells.

The Court: If the Securities Commission permits those conditions to prevail, the Securities Commission, is guilty of a fraud upon the investors of this country. I make that statement without reservation or qualification. The Securities Commission is guilty of a fraud on the innocent investor if they permit this company or similar companies to have a contingent liability of \$3,480,000 and assets of a net value of \$37,000, assuming those assets are worth one hundred cents on the dollar.

Mr. Irwin: They have investigated this whole matter. They have ruled on it.

The Court: Don't you understand I am not speaking merely of your own corporation? I am speaking of the set-up which is allowed to apparently prevail; because there has been no action taken by the Securities Commission. That is true with respect to every other corporation similar to yours. Understand that.

Mr. Irwin: If your Honor please, I think in this case you must consider this fact, that purchasers of securities received, when the Securities and Exchange Act was passed, certain rights which heretofore they hadn't had, and therefore, I think that is all that the contingent liability means, that we are subjected to the possibility of suit. That possibility has not become an eventuality in any substantial way, whatever, as far as our own experience is concerned, and I think it has been the experience of similar companies.

The Court: Will you give me those statements, after you have them marked for identification?

[fol. 371] Mr. Shapiro: On this income, I would like to know what is meant so that your Honor can get it, by this profit on securities of \$121,000 and commissions allowed \$101,000.

The Court: You may ask that question.

Mr. Shapiro: I don't know whom to ask the question.

The Court: Mr. Irwin is here.

Mr. Shapiro: I don't understand this income account. Your statement says, "Profit on securities including Independence Trust Shares net of expense of Trading Department, \$121,000."

Mr. Irwin: In 1937?

Mr. Shapiro: Yes. Beneath that it says, "Less commission allowed on sales of Independence Trust Shares \$101,982."

Two questions arise in view of all this, because this doesn't show the income entirely, it doesn't show the Trading Department income, which is a part of this company. It says, "including Independence Trust Shares net of expense of Trading Department," which indicates you haven't got the Trading Department in there.

Mr. Ross: Yes, it does. It says, "Profit on securities."

Mr. Shapiro: It also says, "net of expense of Trading Department."

Mr. Ross: The expense of the Trading Department has already been taken off from this profit under salary of trader and telephone bills and so forth, a very small amount.

Mr. Shapiro: Salary of a trader?

The Court: Is that shown on this statement?

[fol. 372] Mr. Shapiro: Yes. What is the other \$100,000? Is that an expense also?

Mr. Ross: That is commission paid out.

Mr. Shapiro: To whom?

Mr. Ross: In this case commission allowed on sales of Independence Trust Shares.

Mr. Shapiro: Commission allowed to whom?

Mr. Ross: To brokers who have sold Independence Trust Shares, assuming that some part of it was paid to Capital Savings Plan.

Mr. Shapiro: I think your Honor ought to know this. Here is a statement which shows a gross profit of \$19,000 for 1937. I have asked how they show on their income account for the year \$121,000 income and \$101,000 expense? How can there be \$101,000 worth of commissions on these shares? This statement doesn't explain anything. Who got the \$101,000?

The Court: If it is not clear in my mind, I will direct that there be another hearing had. I have not attempted

to analyze these statements within the short time that was available here to do so..

Mr. Shapiro: Your Honor has the people here. You will only take one glance at this statement and you will see it does not give the information asked for.

The Court: What are you referring to?

Mr. Shapiro: This sheet headed "Income Account" at the end of 1937, August 31, it shows \$121,000 income, and that there was deducted \$101,000 as commissions. I don't know that this company paid any commissions for selling the Independence Trust Shares, but if it did, I would like to know to whom. I would like to know what the \$121,000 represents.

[fol. 373]. The Court: Mr. Irwin, do you have someone here who can answer that?

Mr. Irwin: Yes, Mr. Geary.

ALFRED H. GEARY, recalled.

Cross-examination.

By Mr. Shapiro:

Q. Mr. Geary, the sheet headed "Income Account Independence Shares Corporation" from June 13, 1935 to December 31, 1938 marked Exhibit D-16—have you a copy of this?

A. Yes.

Q: What does that \$121,167.41 mean?

A. That is the gross profit to the Independence Shares Corporation and the mark-up, existing mark-up at the time of the trust shares—

Q. In other words, the Independence Shares Corporation bought a lot of basic stock?

A. Yes.

Q. And deposited it with the Trustee as we have seen here?

A. Yes.

Q. And then sold Independence Shares to plan holders, and in the sale there is a difference between the price or cost at which you put it in the Trustee's hands and the price at which you sold it to the plan holder, in which you made \$121,167, or you earned, I should say?

A. We have to pay a commission, as the prospectus describes, and as it was brought out—

Q. Let us deal with the first amount, \$121,000.

A. That represents a 9 per cent gross profit.

Q. Nine per cent mark-up?

A. Yes.

Q. Plus, if there is any, the difference between the price at which you bought it and the price at which you charged it on the day of the sale?

[fol. 374] A. Our experience has been that we have lost money in the creation of trust shares consistently; by that I mean that the price paid has been higher than the price at which they were bought.

By the Court:

Q. Where is the result of that reflected in the statement?

A. It doesn't show.

Mr. Shapiro: That is what I am trying to point out.

The Witness: We did describe it in our later prospectus. We had a calculation made by Lybrand, Ross Brothers and Montgomery.

By Mr. Shapiro:

Q. But you have not disclosed your profit and loss in the trading account?

A. No.

By the Court:

Q. Why isn't it in the Statement?

A. It is in there.

A Voice: It is part of the figure.

By the Court:

Q. In other words, that is the net result?

A. Yes.

By Mr. Shapiro:

Q. It includes the profits or has taken into account the losses?

A. Yes.

Q. There is nothing in this statement that shows whether you made a profit or a loss in 1937?

Mr. Irwin: As to what?

By Mr. Shapiro:

Q. There is nothing in the paper you furnished to the Court today which shows whether your trading account shows a profit or loss?

[fol.375] A. Is it relevant?

Q. You answer the question. Does it show it?

A. I think not.

Q. Tell us what the \$101,982.96 deduction under that same item of \$121,000 means?

A. The bulk of that was paid to Capital Savings Plan under an arrangement, and I believe it was at that time 1½ per cent which was retained by Independence Shares Corporation and 7½ per cent paid to Capital Savings Plan.

Q. Then the Court understands that as far as the arithmetic is concerned, the 1½ per cent is approximately \$19,000?

A. Yes.

Q. And the \$101,000 is—

A. Seven and one-half per cent.

Q. Where is this \$101,000 of disbursements shown?

A. You will see that in the Capital Savings Plan statement.

Mr. Irwin: What year is that?

Mr. Shapiro: 1937.

By Mr. Shapiro:

Q. What is this "Account Plan incorporated"? Is that Capital Savings Plan?

A. What?

Q. The words "Account Plan incorporated," what is that on one of these exhibits?

A. Wait a minute.

Q. Tell us what "Account Plan incorporated" means on one of these exhibits?

A. I don't know. You better ask the treasurer.

Q. Oh, I see, it is two sheets put together, and it should be "Income Account Capital Savings Plan, Inc., from October 15, 1931 to December 31, 1938."

Does your Honor follow that? If you take the same year, ending August 31, 1937 for the Capital Savings Plan it shows an income of \$420,460.48?

[fol. 376] A. Yes.

Q. What does that come from?

A. Wait a minute. That was from the deductions on plans sold.

Q. Deductions on plans sold?

A. Yes.

Q. I don't follow that.

A. You know there was about sixty cents service fees deducted.

Q. In other words, the Independence charged a 9 per cent mark-up and Capital Savings Plan got the deductions?

A. That's right.

Q. The \$60 and other deductions?

A. Yes.

Q. The \$420,000 represents the deductions plus the \$108,000 you got from the Capital—

A. It so happens that out of that we got \$98,000. The balance was paid to other companies who were using our shares.

Q. In the \$420,000 it includes the 7½ per cent, your share of the 7½ per cent of the Independence Shares Corporation less some deductions you want to tell me about, is that right?

A. No.

Q. Doesn't the \$420,000 include that?

A. You will see that on line three.

The Court: The total here shows \$518,000.

By Mr. Shapiro:

Q. The gross commissions were \$518,000?

A. Yes.

Q. Who got the other deduction, the difference between the \$98,000 and the \$100,000?

A. I assume that was paid out to Income Foundation, Inc., or National Plan, Inc.

Q. Was that another subsidiary of your company?

A. No, sir.

[fol. 377] Q. Another purchaser?

A. Another plan company, distinctly independent altogether.

Q. This item in 1937 was subject to a deduction of \$320,000. Is that for agents and salesmen's commissions?

A. Yes.

Q. That went to the people who sold the contracts?

A. That's right.

Q. Who got the \$185,477?

A. Who got what?

Q. The \$185,477, the item that is called operating expenses. That's right, isn't it?

A. Did you ask a question there?

Q. Yes. I can withdraw it for a minute. You have now a list of expenses, operating expenses before you, of Capital Savings Plan?

A. Yes.

Q. For 1937. I notice an item of \$22,278.59 for professional and special services. That is No. 12.

A. Yes.

Q. What is that for?

Mr. Irwin: If your Honor please, I thought Mr. Shapiro was going to ask Mr. Geary one or two questions. If he wants to go into a detailed examination, I can put the treasurer on. I think the statement speaks for itself.

By Mr. Shapiro:

Q. What is your office?

A. President.

Q. Don't you as president know what you paid \$22,000 for legal expenses for?

A. I can't itemize all of the expenses.

The Court: It is immaterial. Put the treasurer on.

Mr. Shapiro: Put the treasurer on.

The Court: Costs and expenses over a period of years, he may not remember them all.

[fol. 378] ROBERT A. BONNER, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. Mr. Bonner, you are treasurer of what company?

A. Independence Shares Corporation.

Q. I notice that—

Mr. Irwin: If your Honor please, for the purpose of having the record straight I would like to just register an objection to this line of examination as to its relevancy. I won't repeat it and interrupt the examination any further.

The Court: I will overrule the objection and grant you an exception.

By Mr. Shapiro:

Q. I notice in 1937 the item of legal expenses and professional expenses jumped from \$5000 in 1936 to \$22,000 in 1937. What was the reason for that, do you know?

A. No, I can't tell you offhand.

Q. Who made up this report?

A. I did.

Q. If you made the report up didn't you get any of the information in making it up?

A. Not the details. It was made up from Lybrand's reports.

Q. Haven't you any idea why it jumped up \$17,000? What is your answer?

A. We have the details in the books of the company.

Q. Surely you are familiar with them, being treasurer, you are familiar with how that jumped up \$17,000?

Mr. Irwin: I want to object to that statement. No man can be expected to carry the details of these figures in his head.

The Court: All he will have to say is "I don't remember" if he doesn't remember. I am not going to do anything about it.

[fol. 379] By Mr. Shapiro:

Q. What do the professional and special services refer to, legal services?

A. Legal and accounting services.

Q. Do you know who the people are who received those \$22,000—some of them?

A. No, I couldn't tell you.

Q. In the last year, in 1938?

A. I could tell some of them.

Q. Who were they?

A. Townsend, Elliott and Munson, attorneys; Lybrand, Ross Brothers and Montgomery.

Q. Accountants?

A. Yes. There may be possibly others.

Q. Would you say the major portion went to attorneys or the major portion went to accountants?

Mr. Irwin: He said he didn't know.

Mr. Shapiro: If he will say he doesn't know, he will save us a lot of trouble.

\* The Witness: I don't know.

By Mr. Shapiro:

Q. Do you know anything about the next year's item of \$14,000 expense for the same item?

A. I don't know.

Q. I now call your attention to line No. 1 entitled "Officers Salaries" and line No. 2 "Office and general salaries," do you know anything about the details of that? Why those two items were separated?

A. One covers the officers only.

Q. Salaries of officers alone?

A. Salaries of officers alone; and the other covers the salaries of the other office help.

Q. Can you tell us—if you don't know, say so—can you tell us how it is that that item jumped from \$9,000 in 1936 to \$24,000 in 1937?

[fol. 380] A. Only in a vague way.

Q. Wait until I finish. It wasn't your fault, it was my fault. I hesitated a little. And why it was \$34,000 in 1938?

A. Only in a vague way, but your help has to be increased as your business increases and the volume of work that has to be handled requires the employment of more—a greater number of individuals. Also, because of the fact in better years you are inclined to compensate the employees a little bit better than you do in ordinary times.

Q. Are the salaries for 1939 being paid on the same basis as the salaries for 1938?

A. No, sir.

Mr. Irwin: I think I gave the details of that.

Mr. Shapiro: I think we have that somewhere.

By Mr. Shapiro:

Q. I would like to ask you, Mr. Treasurer, while you are on the stand, whether or not the trading account is kept separate so that the profits or losses can be ascertained?

A. Separate records were kept of the trading department.

Q. In the \$121,000—

A. I can say this, if you want the separate figures of the trading department I feel confident I can get them for you.

Q. The \$121,000 profit or income, as it is called, in 1937, includes the profits or the losses, whichever they were, of the trading account, is that correct?

A. That is correct, and applies to other years as well.

Q. Do you know whether in 1937 you made a profit or not, generally? I am not asking you the amount?

A. On the trading department?

Q. Yes.

A. I couldn't tell you.

Q. Is it a fact you did trade in the stock in addition to selling the plan?

[fol. 381] A. Yes, we had an employee—not in stocks—who traded in trust shares other than Independence Trust Shares?

Q. For his benefit?

A. For the benefit of the company.

Q. What was the fellow's name?

A. Clifford Kief.

Q. Tell us what he did. Explain it to the Court.

A. Well, he had a couple telephones and a switchboard, and they gave him a direct telephone connection with other brokers. He was an expert in trading in trust shares. He could find a market for trust shares if anybody had them for sale, or find shares in case anyone wished to buy them.

Q. All right.

A. The brokers would call him up and give him their orders and he would go into the market and buy from a second broker and fill the order and make a small profit for the company.

Q. Yes. What did you pay him for—how was he paid for his services?

A. He was paid a straight salary.

Q. How much?

A. \$150 a week was the peak pay.

Q. When he sold those shares were there any commissions paid?

A. No, sir; none at all.

Q. Were there any commissions charged to the purchaser?

A. No, sir.

Q. Are you sure of that?

A. You are talking—you are thinking about Independence. I have been talking about the other shares.

Q. I am thinking about the shares which were sold.

A. The shares that he sold to other brokers, there was no commission paid or charges attached.

Q. Which of the shares was it you charged a commission and the commission was paid to Kief outside of the salary?

[fol. 382] A. That was probably Independence Trust Shares.

Q. Explain that to us how that was done.

A. Mr. Kief would buy the shares generally at a price maybe four or five cents above the actual market price of the shares.

Q. Yes.

A. And that way he more or less assured himself the shares on the market would come into the possession of the company. They would come there eventually anyway. The company would sell those shares as they had orders for them to individuals making payments under Capital Savings Plan certificates.

Q. Yes.

A. And whenever shares were sold, the price was calculated to include the  $7\frac{1}{2}$  per cent mark-up.

Q. Yes. To come to a specific Independence share, it was bought by Mr. Kief and then when it was sold it was sold by him, by the company to the plan holder and the  $7\frac{1}{2}$  per cent mark-up put on that share?

A. The share would be sold to the Pennsylvania Company for the account of the plan holder.

Q. Who delivered it to the plan holder, the Pennsylvania Company?

A. Yes. Whenever shares were sold in that manner the price was computed with the mark-up of  $7\frac{1}{2}$  per cent.

Q. That had nothing to do with the basic shares at all?

A. No, it was secondary.

Q. That dealt merely with the certificate itself?

A. Yes.

Q. That means that if Kief bought the share at 1.52 you would sell it to the plan holder through the Pennsylvania Company at 1.52 plus  $7\frac{1}{2}$  per cent?

A. Not necessarily. I said that Mr. Kief was accustomed to paying what you may say a little bonus on these shares in order to secure them.

By the Court:

Q. In order to preserve the market?  
[fol.383] A. Well, it wasn't a question of that.

By Mr. Shapiro:

Q. To make sure you would get the shares?

A. Remove the shares from the market that were offered.

Q. It is another way of saying to preserve the market.

Mr. Irwin: Let him finish.

Mr. Shapiro: Don't be so finicky.

Mr. Irwin: I think the witness is entitled to finish his answer.

By Mr. Shapiro:

Q. You and I are getting along very well.

The Court: They seem to be.

Mr. Irwin: I think he is entitled to finish his answer without Mr. Shapiro cutting him off.

Mr. Shapiro: When I cut you off, tell me about that. I am the only one in that situation. We are getting along all right, if Mr. Irwin would only leave us alone. You finish your answer, if I interrupted you, please.

The Witness: There were only about two markets for shares, one through the redemption fund and one through the Independence Shares Corporation.

By Mr. Shapiro:

Q. Tell me about that redemption fund. I didn't know about that before.

A. If you held shares, say you had 1000 trust shares, you sent them into the Pennsylvania Company and withdraw the underlying securities.

Q. Yes.

A. Then it would be up to you to deposit those underlying securities through any broker, and if you didn't wish [fol. 384] to do that you could sell the shares to a broker on the street and possibly they would come to Mr. Kief. Some

other broker intercepted them for his customers, and if any came to Mr. Kief he would buy them for Independence Trust Shares.

By the Court:

Q. He was really there to make a market, wasn't he?

A. If you want to call it that, I don't see any objection.

Q. That's what it was, wasn't it?

A. Independence Trust Shares did not need a market in the sense that other securities may need such a market; they have an automatic market.

Q. It would make a market available if someone wanted it?

A. Yes.

By Mr. Shapiro:

Q. It became known among the brokers that all they had to do was to call up Kief and he would pay three or four points above what was generally offered?

A. Yes.

Q. And you took those very shares and sold them to a plan holder or anyone, if he same in, and added what to the price?

A. We would sell them to the Trustee for numerous plan holders.

Q. And added what to the price?

A. The mark-up.

Q. Which was  $7\frac{1}{2}$  per cent or 9 per cent?

A. Yes.

Q. I didn't get that redemption fund business. What was the redemption fund?

A. The redemption fund was operated by the Pennsylvania Company, Trustee. Shares coming into that fund may be redeemed by the Trustee in cash or may give them underlying securities.

[fol. 385] Q. I am going to ask you one more question and that is when the plan holder bought the shares through the trust company in the usual way, the commission was charged on the basic stock, wasn't it, the brokerage commission in addition to the  $7\frac{1}{2}$  or 9 per cent?

A. The brokerage commission would be paid over daily. The calculation appeared on the price make-up sheet that is handed to the Trustee every morning.

Q. When the plan holder bought those shares that Kief bought, he got charged for a commission too, didn't he, a brokerage commission in addition to the nine?

A. Yes. That would appear on the price make-up sheet.

Mr. Shapiro: That is all.

By Mr. Irwin:

Q. Mr. Bonner, in connection with the Independence Trust Shares sold to the Pennsylvania Company that Independence Shares Corporation had purchased in the open market, what was the basis of the price at which those shares were sold to the Pennsylvania Company as Trustee for plan holders?

A. The closing price of the market; the market price at the close of the day for which the Trustee received moneys for investment.

Q. The previous day?

A. The previous day.

Q. And if—

Mr. Shapiro: Are you asking about the basic stock?

Mr. Irwin: I am asking about Independence Trust Shares.

By Mr. Irwin:

Q. If those Independence Trust Shares purchased by Mr. Kief were purchased at 1.54 and the price as determined by the value of the underlying securities on the day previous [fol. 386] was 1.50, would you sell them to the Pennsylvania Company as Trustee at \$1.50 or \$1.54 plus 7½ per cent?

A. We would have to sell them at \$1.50.

Mr. Irwin: That is all.

By Mr. Shapiro:

Q. I don't understand. You mean you sold to the Pennsylvania Company—having paid today \$1.54, you would sell them to the Pennsylvania Company at the price paid yesterday?

A. At last night's closing price of the underlying securities. If that calculation brought a price of \$1.50, we would be obliged to sell to the Trustee at a \$1.50.

Q. You fix the price yourself?

A. No, sir; the market controls that.

Q. I mean Mr. Kief.

A. We did not.

Q. When Mr. Kief paid \$1.54 you calculated on the basis of \$1.54?

A. No, sir.

Q. If today he paid \$1.54—you send your calculation into the Pennsylvania Company when?

A. If those shares were used today, the same day we purchased them we would have to sell them at \$1.50.

Q. If today Mr. Kief, at ten o'clock this morning—when did you send your statement to the Pennsylvania Company?

A. About ten or eleven o'clock in the morning.

Q. If the night before Mr. Kief paid \$1.54 for them and you sent the statement to the company, you figured at what, \$1.54 if it was the market price?

A. No, sir; the price to the Trustee and investors is based entirely on its closing market price of the day before the investment was made.

Q. How is that market ascertained, if there is no such price? It is an over the counter market.

A. Mr. Kief must judge during the day as to what price he should pay or is willing to pay. He can afford to pay, [fol. 387] for instance, more than the general market price because there is a cost incident to the creation that he could save by picking up shares in the street.

Q. He fixed his own arbitrary price.

The Court: Is this very important?

Mr. Shapiro: Yes.

The Witness: Mr. Kief could fix an arbitrary price.

#### DISCUSSION

The Court: Whose papers are these?

Mr. Shapiro: One of them is ours. I think you ought to ask for a copy of the trading account of both Mr. Kief and the company's trading account. I should like to make that request at this time to the Court that you be furnished with a copy of the trading account for the same period.

The Court: How much business does it involve? I don't see that it is material. If it is reflected in their profit or their securities transactions, that is the net result of the operation.

Mr. Geary: It is a very small operation. It wasn't profitable. Mr. Kief is no longer with us. We have abandoned it.

The Court: Take the year 1937; it is reflected in your \$121,000 statement of income.

Mr. Geary: Yes.

Mr. Shapiro: There is also a profit and loss in the mark-up of the securities from the time they bought them until they sold them which had nothing to do with Mr. Kief. My position is if this company that was trading in this stock was laying itself open, subjecting itself to depreciation in prices and fluctuations of the market, you ought to take the extent to which that was done into consideration.

Mr. Irwin: You have not done it any more?

[fol. 388] Mr. Geary: We haven't done it in quite a long time.

Mr. Shapiro: What does that mean?

Mr. Geary: About eight months.

The Court: You are no longer doing it?

Mr. Geary: No.

Mr. Shapiro: Mr. Kief was dismissed in the beginning of last year or the beginning of this year?

Mr. Geary: The trading activities were terminated before then.

Mr. Irwin: If your Honor please, before the argument on the motion, I would like to file with the Court exceptions to the order of the Court refusing our motion to dismiss, and exceptions to the order of the Court referring the matter to Mr. Hill as Master.

The Court: You may file them.

Mr. Irwin: I would also like to state for the purpose of the record that in view of the fact the Court has denied our motion to dismiss and in view of the fact counsel for the plaintiff has asked for a restraining order, I now withdraw the agreement that I have made on behalf of the Independence Shares Corporation that the moneys due the Independence Shares Corporation from the Pennsylvania Company approximating \$35,000 would not be paid until this matter was disposed of. This money represents compensation to the Independence Shares Corporation for creation of Independence Trust Shares for the planholders who elected to reinvest the cash payable to them arising from the sale of the seven underlying securities.

The Court: Mr. Irwin, what is the exact amount? It is around 35,000. Has there been any calculation? We speak roughly of it as \$35,000.

[fol. 389] Mr. Irwin: That is the only figure which I have, which is approximately \$38,700.

The Court: Can't we get the exact amount? There must be some calculation between the Independence Shares Corporation and the Pennsylvania Company. It was about 7½ per cent. of approximately 550,000.

Mr. Saul: We can get that figure over the telephone, sir, and it can be put on the record.

Mr. Rudenko: I should like to move, in accordance with Rule 15 of the New Supreme Court Rules of Practice, that the caption of the complaint be amended by adding thereto two other persons as parties plaintiff.

The Court: Any objection?

Mr. Irwin: I don't know what it is, if your Honor please.

The Court: We will consider it.

Mr. Irwin: For the purpose of keeping the record clear, I object to the addition of these additional plaintiffs in the absence of any jurisdiction, by reason of the fact that the original plaintiffs failed to have the required amount; I do not think that that defect can be cured by adding subsequent plaintiffs.

The Court: That goes to the merits of all of the plaintiffs' positions. This motion is merely in conformance with the Supreme Court Rule No. 15 to amend parties plaintiff. It won't prejudice you in any way.

Mr. Irwin: I just want to have my objection on the record to the addition of any parties.

The Court: You object generally?

Mr. Irwin: Yes.

The Court: I will reserve decision on the matter.

Mr. Bohlen: Note a similar objection on behalf of the Pennsylvania Company.

[fol. 390] Mr. Rudenko: Rule 15 of the New Supreme Court Rules says:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . ."

We are on a motion—

The Court: We have before us a motion for a preliminary injunction. That is the only thing before us. Proceed.

Mr. Rudenko: The opinion filed by the Court indicates very strongly that it would be desirable and necessary to preserve the status quo. The preservation of the status quo in this matter would rest on this basis, that the moneys in the hands of the Independence Trust Company and particularly in the hands of the Trustee be not disturbed, and all of the assets, whatever they are, and wherever they are that may be available hereafter to satisfy the claims of any shareholders or any persons who by virtue of your Honor's opinion may be creditors, set up a cestui que trustent, be not dissipated pending such order. We, therefore, prepared what we think are appropriate injunctions which would prevent both the Trustee and Independence Trust Shares Corporation from disturbing or dissipating or diverting any of the assets of Independence Trust Shares or any of the trust funds in the hands of the Pennsylvania Company.

I think the motion speaks for itself, if your Honor please, so does the injunction. Particularly, we should like to have enjoined the Pennsylvania Company from distributing to the defendant Independence Shares Corporation the moneys in the hands of the Pennsylvania Company which are asserted by the defendant company to be due it, and which I think belong to the shareholders.

The Court: You are referring to this approximately \$38,000, are you?

[fol. 391] Mr. Rudenko: Yes.

The Court: You also asked that the defendants be enjoined from operating, didn't you? Isn't that the effect of paragraph 2, paragraph B and paragraph C?

Mr. Rudenko: I think that is the effect of it, if your Honor please.

The Court: You are asking first that the Pennsylvania Company be enjoined from paying over to the Independence Shares Corporation the 7½ per cent overwrite on approximately \$550,000 worth of securities, the \$550,000 which was involved, or, received from the sale of the seven of the forty-two underlying securities?

Mr. Rudenko: That is correct.

The Court: Then you are also asking that the Pennsylvania Company be restrained, or, be ordered and directed to segregate all payments made by plan holders after March 11?

Mr. Rudenko: Yes, sir.

The Court: That is your second application. Then you ask thirdly that the Independence Shares Corporation be restrained from doing any business.

Mr. Rudenko: If your Honor's opinion will stand—I heard some talk of an appeal—it necessarily follows that the defendant will have to be liquidated. If it is going to be liquidated, only confusion can follow by the sale of such of the Independence Trust Shares—

The Court: I see Mr. Saul on his feet.

Mr. Saul: May I first give to your Honor the figure of \$38,258.85.

The Court: \$38,258.85?

Mr. Saul: Yes. May I say a word in behalf of the Pennsylvania Company? This restraining order appears to be [fol. 392] directed primarily at the Pennsylvania Company. I would like certain facts put on the record. I think they will be admitted. I would like to make it perfectly clear first that the only interest of the Pennsylvania Company in this proceedings is that of a Trustee who desires to perform his duties as Trustee. I think the evidence before you shows that the Pennsylvania Company primarily, under the agreements, has three very important duties. I will confine my remarks to those three. The first is to deliver, under the terms of the Trust Agreement which is perfectly clear, to such of the plan holders or contract holders who desire to withdraw the underlying stock, or the trust holdings in accordance with the Trust Agreement, their share of the trust fund. That is their obligation. That obligation goes to the whole amount of the trust fund. I am using round figures. There are approximately, at the present market price, three million and a half dollars worth of these underlying stocks that belong to some approximately 20,000 people in Philadelphia. Under the terms of this trust, the Pennsylvania Company, is bound, when the person for whom it holds this stock in trust requests delivery to make delivery.

If by any chance the trust company should be restrained—I confess I can't conceive on what ground the Trustee could be restrained from complying with the plain terms of the trust—but if any such restraining order were issued, and let us assume any considerable number of these persons under the terms of the deed of trust say, "Hand us back our stock," and the company were prevented from doing it by an order of court, and in the meantime some catastrophe

happened somewhere in the world and the prices go down, even if they went down 10 per cent. and if everybody asked for their stock back and couldn't get it and the price dropped 10 per cent. there would be a loss of \$350,000. I am not saying they all would, but it is the possibility I am talking about.

[fol. 393] The Court: If I may interrupt you, Mr. Saul, I do not understand that the application is to restrain the company from doing that.

Mr. Saul: Yes, it is.

The Court: I understand he is asking that the company be restrained from paying the Independence Shares Corporation the 7½ per cent. overwrite on the \$550,000, and secondly that the company be directed to segregate all payments made after March 11, 1939.

Mr. Saul: Perhaps my friend on the other side is not very precise in the use of language, but I will read you the motion that was served upon us:

"That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be restrained and enjoined from paying over, selling, assigning, crediting, delivering, transferring or otherwise disposing of, to the defendants or any of them, directly or indirectly, in any manner whatsoever, any property, assets, funds, money's, deposits, credits, stocks, bonds, Independence Trust Shares, Independence Trust Shares Purchase Plans, Capital Savings Plan Contract Certificates, and any and all other contracts, documents, or other matter, in any way dealing with, connected with, or arising out of the said Capital Savings Plan Contract Certificates, the said Independence Trust Shares Purchase Plans, the said Independence Trust Shares, and the trust agreements, and any other agreements, between the defendants.

"That the defendants and each of them be restrained and enjoined from buying, selling, exchanging, transferring, assigning, liquidating, redeeming or otherwise dealing in or disposing of Capital Savings Plan Contract Certificates, Independence Trust Shares Purchase Plans, the Deposit Units of which Independence Trust Shares represent as undivided interest, Independence Trust Shares, and the [fol. 394] shares and stocks making up or constituting the said Deposit Units."

and so on and so forth.

The defendant is to be restrained from selling and enjoined and so forth, and I say to you, the way this order is drawn it simply means the Pennsylvania Company could do nothing to carry out the terms of the trust. That is one thing they do. I would just like to point to the three primary duties of the Trustee.

The Court: I wouldn't think of issuing such an order.

Mr. Saul: I have nothing further to say.

The Court: Which would prevent the Pennsylvania Company from preventing withdrawals of plan holders.

Mr. Rudenko: We didn't intend to include that.

The Court: The language is all-inclusive.

Mr. Rudenko: We followed as closely as possible—

The Court: I didn't mean to cut you short. Our minds meet on that.

Mr. Saul: The other two things I would like your Honor to keep in mind are first that daily there are people sending in money to the Trustee. It is the Trustee's duty to invest that money. If it is restrained from investing and the price goes up, they lose; on the other hand, if the price goes down the people who want to get out lose.

The third thing is there is an insurance policy in the face amount of \$5,000,000, insuring the lives of approximately 6700, almost 7000 plan holders, and the premium is payable monthly.

The Court: And there must be a deduction made by the trust company for the payment of premiums?

Mr. Saul: Yes.

The Court: Otherwise there would be a lapse in the policy.  
[fol. 395] Mr. Saul: And that kind of policy can be no longer written, and if that policy lapses, they can never be compensated, they lose that. That affects approximately 7000 people, approximating \$5,000,000.

The Court: That would be an injury to the plan holder in case there is a death?

Mr. Saul: Yes.

The Court: I would not make such an order.

Mr. Saul: Look at the order. Here you have seven plaintiffs who apparently have an interest of—possibly they have paid in some \$3000 or so. As a result of paying that in, they have the same proportionate part of interest in that stock as the other people have, but it is only a very small proportion. If they are not satisfied, if they don't want the Pennsylvania Company to act as Trustee, they have got a

perfect legal remedy. They don't need to go to law, all they have to do is exercise their right and take their property away from the Trustee and they are free from the Trustee forever.

The Court: As I understand it, there was never a contention made by the plaintiffs that there was on the part of the Pennsylvania Company any criticizable conduct. I tried to make that as clear as my language would permit, in my opinion, that there was nothing criticizable in the conduct of the Pennsylvania Company. There was no complaint made of the Pennsylvania Company.

Mr. Saul: We were in the position yesterday of having somebody come to us and say, "We want so many underlying shares we are entitled to." Fortunately, the one who represented them was very reasonable. We pointed out to him we had this injunction. We told him we would go ahead and get it ready, but there was the possibility of something happening at this hearing.

What I mean to say is we have demands made on us daily to comply with the terms of our trust, and we want to do it. [fol. 396] That is all we want to do; do what we are supposed to do under this deed.

Mr. Rudenko: If your Honor please, I should like to complete the statement I began to make before. The injunction was drafted in strict accordance with the language of your opinion, and in accordance with what we think is our duty to all plan holders under the language of your opinion. Persons who were heretofore shareholders, but who were paid out, who had their shares redeemed by the Pennsylvania Company, are entitled to recover from somebody the difference between the money they received and the money they paid in plus interest.

The Court: If there was fraud and misrepresentation, concealment as to material facts of which the plan holders were ignorant. It must be subject to that reservation. There may be persons in this case—I am not passing finally on it—there may be persons in this case to whom no misrepresentation was made, or concealment of facts. If so, unless there is liquidation of the company, they have no complaint.

Mr. Rudenko: Yes, of course, but if there are persons who are entitled to be paid for the moneys they paid in, there is no special fund except the fund in the hands of the Pennsylvania Company.

The Court: Let us get one thing clear. I am not deciding before I have heard from Mr. Irwin, but you have several requests here that are far apart; they are premised on varying and sharply contradictory considerations. First of all, your request as to the \$38,000, that the Pennsylvania Company be restrained from paying to the Independence Shares Corporation. On that, we had an agreement, as I understood it. I said to Senator Shapiro I thought that that agreement would be honored by all of the parties concerned. Senator Shapiro thought in the protection of the interests of his clients there ought to be some action by the Court, and there ought not to be a mere reliance upon the under-[fol. 397] taking by the Independence Trust Company and the Pennsylvania Company to make the application which, certainly on its own face is unrelated to the other applications which you have made. Another application which you made here, or series of applications, is broadly premised on one consideration, and that is that you think the company ought to be put out of business immediately.

Mr. Rudenko: That's right.

The Court: I won't make such a ruling. I am not going to make a ruling which will have the effect of putting this company out of business, because then I would be deciding this matter without awaiting the report of the special referee. If there is a solvency in this case of this company, it may be possible for all of the plan holders to realize and satisfy any claim which they may have, and I may make it impossible for them to realize these claims if I put this company out of business by issuing such a sweeping restraining order.

Mr. Rudenko: We don't press that injunction, we have simply presented it to you. We think it follows the language of your opinion. We think it is all due to the plan holders.

The Court: You have read something in the opinion which I have not put in it and which I did not intend to put in it.

Mr. Rudenko: The Pennsylvania Company at the present time is Trustee of a fund, either stocks or money or both. There are persons who are presently shareholders, who are coming in and who possibly are redeeming or liquidating their shares and are getting money from the Pennsylvania Company. Under the language of your Honor's opinion certainly all of that fund is accessible for the claims of all of

the shareholders. Isn't the payment to some of the shareholders a preference as against the balance of the shareholders? If eventually it is determined your opinion stands, [fol. 398] will not the Pennsylvania Company have granted a preference to those shareholders to whom it made payments?

The Court: You cannot get a 100 per cent result in this case. You have some 20,000 people paying in amounts varying from five, ten, to fifteen dollars per month. Most of them, I suppose, are five and ten dollar payments, under the terms of three separate trust agreements between the Independence Shares Corporation and the predecessor company with the Pennsylvania Company, and they are required to invest in the underlying shares or Independence Trust Shares. That is an obligation on the part of the Trust Company under the terms of the trust agreement. When I speak of the trust company, I mean the Pennsylvania Company. It is one thing to restrain a company from using money to carry out the purpose of a trust that it is another thing to restrain the Independence Shares Corporation from making any further sales to new plan holders. That is a different request.

Mr. Rudenko: That's right.

The Court: I will hear you on that phase of it. I take it that would be embraced in the sweeping language which you have used. I won't make any order which will prevent the Pennsylvania Company from receiving monthly payments which come in daily—many of them. I suppose you receive money every day?

Mr. Saul: Every day, yes, sir.

The Court: I won't make an order which will prevent the Pennsylvania Company from carrying out the terms of the trust.

Mr. Rudenko: As to that, we simply ask that the money be segregated.

The Court: They must invest the money under the terms of the trust, in Independence Shares Trust Certificates. [fol. 399] Mr. Rudenko: If that is so, how are we to differentiate between claims of shareholders who are presently paying money and possibly are only entitled to that money and no other money, and prior claims?

The Court: That would make a very small change in their position. A man who paid in \$300 over a period of thirty months at ten dollars a month, in the course of the next

month pending final determination of this whole matter, he may pay in another ten dollars; certainly there could not be paid in so much money as would make a tremendous change in the position of any one plan holder. Any sweeping order I might make along the lines you indicate undoubtedly would have a drastic effect on the individual plan holders. However, I would like to hear from Mr. Irwin who represents Independence Shares as to why there should not be an order restraining Independence Shares Corporation from making new sales; I mean from selling to new clients; also as to why an order should not be made restraining the Pennsylvania Company from paying over to the Independence Shares Corporation that \$38,258.

Mr. Irwin: As I understand it, if your Honor please, there is no other question that your Honor desires to hear me on, inasmuch as your Honor has ruled that insofar as our creating shares and supplying them to plan holders who have paid their money to the Pennsylvania Company, that that will not be restrained.

The Court: With reference to the present plan holders.

Mr. Irwin: The present plan holders. If your Honor, please—

The Court: In other words, there are two matters I would like to hear you on, one is an order restraining the payment of this \$38,000, and No. 2, is on the application for an order to restrain and enjoin the Independence Shares Corporation from selling new contracts or selling to new plan holders.

[fol. 400] Mr. Irwin: I take it, sir, from the order which your Honor handed down and from the statement that your Honor has made in the record at the conclusion of the hearing on April 3d, that your Honor has not passed on the question of solvency or insolvency of this company, and that your Honor considers that as a necessary fact to be within your Honor's mind when you come to the final decision.

The Court: I wouldn't qualify that; not as a necessary fact, but something upon which I would like to be advised before finally passing on the application for appointment of a receiver.

Mr. Irwin: Well, a necessary fact to your Honor—I will put it this way, a fact your Honor considers essential to consider fully the entire case.

Let me point out to your Honor that as has been stated before, there are 20,000 plan holders here. There are some

nine complainants. Not one of those nine complainants appeared at the hearing before your Honor and not one iota of testimony upon their behalf appeared from them as to the circumstances under which they were sold. In addition to that, there were some eight witnesses who at one time or another had bought plans. Of those eight witnesses, four had either received their money back in full and had no further interest in the matter whatever; this matter, as I understand it from your Honor's ruling, has not been finally determined. I, therefore, think that in the light of that, that no order should be made against the Independence Shares Corporation in this case. Unfortunately, but true, we have suffered untold harm as a result of the publicity which we received as a result of your Honor's order.

We are in the position where we are virtually helpless to do anything or say anything, and yet we see spread through the press, not only of Philadelphia, but throughout the State of Pennsylvania publicity which was most unfair and harmful to this company.

[fol. 401] The Court: I won't consider any criticism of the opinion which I made. If I erred, you have your remedy.

Mr. Irwin: I know, sir, but it was in such language—  
The Court: I won't hear any further discussion as to any of the findings. They are no more and no less than what was embodied in the consent decree to which your client, Independence Shares, consented in June, 1938, when the complaint was filed by the Securities and Exchange Commission.

Mr. Irwin: If your Honor please—

The Court: I won't—I think you are wasting our time. I won't hear anything further on the merits of my ruling to date, and my ruling to date is simply this, I have dismissed your motion; I denied your motion to dismiss, filed by the two defendants in this case—the individual defendants. I also referred to the Special Master the question of a consideration of the solvency or insolvency of the Independence Shares Corporation. I will hear you only on this application which has been made today. I will hear anything that you have to say in answer to the request that is before me today.

Mr. Irwin: In the light of the fact that there is nothing pending at the present time, I don't see any reason why this company should be enjoined from the normal conduct of its business in any decree. If the sale of new plans is a

part of our business, if that can be done, I don't see what harm can be done as far as these complainants here are concerned. I don't see what harm can be caused to anybody who might have claims.

As your Honor has said, there may be, and I can say to your Honor, in fact there are thousands and thousands of people who have bought these plans without any complaint of taint or fraud or misrepresentation. I do believe, sir, that there is nothing in this record, or there is no cause which should motivate your Honor in feeling it essential for [fol. 402] the protection of any of the parties in interest, that the activities of this company be suspended.

The Court: I certainly think it is essential that the money not be paid over and be held by the Pennsylvania Company pending the final disposition of this matter. It is no more than what you agreed to do. I have not received notice of any application. I felt that any undertaking you would make as counsel, and Mr. Bohlen, would be kept by your clients.

Mr. Irwin: It has been kept.

The Court: I thought it would be continued to be kept.

Mr. Irwin: It has been kept, and if your Honor feels that I have made any statement there that perhaps misled your Honor, I want to say to you that when I made that statement it was when this motion to dismiss was pending before your Honor, and when I felt that the matter would be disposed of promptly.

As a matter of fact, it was—and I am not saying this in any spirit of criticism of your Honor—but it was seven weeks before that matter was finally disposed of.

The Court: There were several hearings held in the matter, there were some 500 pages of testimony and 180 or 190 exhibits. I think the matter was started on March 11th, the first hearing was held March 27th and the matter was finally concluded May 3d—it was not finally concluded, but my opinion was filed on May 18th.

Mr. Irwin: Yes.

The Court: Had you not withdrawn what may be described as a gentleman's agreement, I would not grant the preliminary injunction because there would be no necessity for it. You forced me to act in the matter by reason of the fact you withdrew that agreement. I would have gone on the assumption that any undertaking made by you as coun-

sel, would be kept and there would be no necessity on the [fol. 403] part of this Court to issue a restraining order. In view of the fact you have withdrawn the agreement, you have compelled a decision on this matter by action of the Court.

Mr. Irwin: If your Honor please, I made that agreement after—

The Court: I am not criticizing you. You advise your client as you think you ought to advise them, but I do say that had you not withdrawn the agreement at the inception of this hearing, in view of the action taken by Senator Shapiro's office—

Mr. Irwin: I withdrew it because here we were faced with a series of motions and order contained therein which would have virtually put us out of business.

The Court: In my opinion it would have been totally useless and unnecessary for me to issue an order where counsel, reputable counsel, had agreed to do the very thing which the order seeks; there would have been no necessity on my part to do that.

Mr. Irwin: We have not deviated from that agreement one iota, if your Honor please.

The Court: Do you withdraw it or don't you withdraw it?

Mr. Irwin: If your Honor please, in view of what your Honor has said, I would like to consult with my client if your Honor would indulge me for a moment or two so that I can discuss the matter with him.

The Court: All right, I will permit you to do so. We will take a five-minute recess.

(Recess from 4 o'clock P. M., to 4:10 o'clock P. M.)

[fol. 404]

After Recess

Mr. Irwin: If your Honor please, after considering everything in this matter and after discussing it with my clients, I must stand on my statement made at the inception of the hearing that any agreement that we have made in regard to this thirty-eight thousand and some odd hundred dollars is withdrawn. The motion has been interposed, in the meantime we have been without the funds for quite some eight weeks, and under all the circumstances we do not feel—my clients do not feel and I do not feel we should agree not to receive that which we are justly entitled to.

If your Honor does make an order, I would request your Honor request a bond in sufficient amount to cover possible loss.

The Court: Of course, under Rule 65, Section C, I must fix such an amount as I deem proper.

Mr. Irwin: It is discretionary with you.

The Court: What is your thought? I would like an expression of opinion on your part. We are speaking of a bond as to the \$38,000?

Mr. Irwin: Yes.

The Court: What is your thought in the matter?

Mr. Irwin: I think the bond should be at least \$2000 so that in the event of an appeal and action by the Appellate Court, that the bond would protect us as to the cost of that appeal.

The Court: Well, I don't see why \$1000 would not be enough. There is only \$38,000 involved. If the company had the money invested at 2 per cent, which is all you can get in a bank—you wouldn't get that in a savings account, you would not get more than 2 per cent on it. That is \$760 per year. This matter certainly will not last more than one [fol. 405] month or two before its final determination, so I think \$1000 would be ample because the loss of interest would be in the neighborhood of fifty or one hundred dollars.

Mr. Irwin: I think, your Honor, what you say there is right, but I think the bond should be adequate to cover the cost of any appeal in this matter.

The Court: I think \$1000 would be adequate. I will hear you on that.

Mr. Rudenko: I agree with your Honor on \$1000. May I say one further thing—

The Court: Have you concluded, Mr. Irwin?

Mr. Irwin: Yes.

The Court: Go ahead. Do I understand under the rules that I must fix a bond where I issue a restraining order?

Mr. Rudenko: That's right. It is in your Honor's discretion. Since we are dealing with possibilities, there is this possibility that tomorrow the Independence Shares Corporation may determine to liquidate some more of the underlying securities. Now, of course, it may be perfectly true that tomorrow it may be advisable to liquidate the securities. At the same time, from the viewpoint of the plan holders who are cestui que trustent, it may not be ad-

visible. I say that some order should be made forbidding liquidation of securities without the Court's consent, or without a hearing.

The Court: Is it in contemplation that any securities will be liquidated?

Mr. Irwin: The securities are all in the hands of the Pennsylvania Company. If someone comes in—

The Court: I am not referring to that; I think Mr. Rudenko is referring to the sale of underlying securities.  
[fol. 406] Mr. Rudenko: Yes; sale or elimination of further securities.

The Court: All right.

Mr. Irwin: I can assure your Honor that there is no such contemplation.

The Court: In the event such action is contemplated, will you consult the Court?

Mr. Irwin: I would consult the Court before any such action along that line was undertaken. I think it is due the Court, and I will assure you that will be done.

The Court: That will be enough for me.

Mr. Rudenko: I should like to hear from Mr. Saul and Mr. Bohlen.

The Court: That isn't necessary because in my opinion I said the decision to eliminate securities rests entirely with Independence Shares Corporation and the Pennsylvania Company is utterly and absolutely without any control or authority in the matter.

Mr. Rudenko: I will withdraw my suggestion. If your Honor please, so that there will be no misunderstanding, I understand Mr. Irwin to say on behalf of his clients that no shares will be eliminated from the portfolio hereafter unless you are advised in advance of such intended or proposed action?

The Court: So that you may have an opportunity at that time to ask for an order.

Mr. Irwin: While the matter is pending before your Honor, you have my assurance on that.

The Court: That is sufficient for me. As far as the applications before me are concerned, the first one is an application for an order enjoining the Pennsylvania Company from paying \$38,000 to the Independence Trust Corporation and [fol. 407] the other is a request for an order enjoining the Independence Shares Corporation from selling new contracts. As to the first, if you will prepare an order so that

it will be satisfactory in form, I will issue the order enjoining the Pennsylvania Company from paying over to the Independence Shares Corporation and Independence Shares Corporation from receiving this \$38,258.85, which is the 7½ per cent overwrite or load as was described on the elimination of the \$550,000 worth of securities which has been reinvested, bond to be fixed in the sum of \$1000.

Mr. Irwin: If your Honor please, in that connection, of that \$38,500 approximately 34,000 represents what would be the reinvestment of the cash principal at that time. There was income from those underlying shares which was received at the same time of approximately \$4500. That is the—

The Court: Which income was distributed or dispersed among shareholders?

Mr. Irwin: Where the income was paid to the Pennsylvania Company and reinvested.

The Court: I am afraid I don't follow you.

Mr. Irwin: Well, I will try to make myself clear on it.

The Court: All right.

Mr. Irwin: At that time there was due and payable this sum of \$38,500, \$34,000 of that was from the reinvestment that was due to us as a commission from—

The Court: That constituted the 7½ per cent overwrite?

Mr. Irwin: The \$34,000 would be 7½ per cent on the principal sales, or proportion of the sales that were due to the plan holders. That was reinvested. The \$4500 represents income from all the underlying securities that was paid to the Pennsylvania Company and which would be one of our normal sources of income.

[fol. 408] The Court: Was that the 2½ per cent?

Mr. Irwin: No, it is not the 2½ per cent, that would be at the same rate, 7½ per cent, but it represents, say \$60,000 of income that was paid to the Pennsylvania Company which in turn was reinvested by us.

The Court: Was that 7½ per cent on that too?

Mr. Irwin: Yes, that is what the plan calls for.

The Court: I will put that in my order.

Mr. Irwin: I wanted you to know that, due to the fact that that would not all represent the proceeds of the sale of the eliminated securities.

The Court: That is 7½ per cent of the reinvestment of the proceeds from the sale of the eliminated securities and 7½ per cent of the reinvestment of the cash dividends.

Mr. Irwin: At that time.

Mr. Rudenko: I understood what your Honor was interested in was preventing the payment of any income from any source from the Pennsylvania Company to Independence Shares Corporation. I don't think they are entitled to any income at all irrespective of the manner of creation.

The Court: Then I misunderstood you. I thought your application only went to the sale or elimination of the \$550,000 worth of securities. Do you mean any further income?

Mr. Rudenko: Any income whatever in the hands of the Pennsylvania Company which Independence Shares Corporation says it is entitled to. I think pending the proceedings—of course, we will put up a bond for it—the Independence Shares Corporation should not get any money from the Pennsylvania Company to which plan holders may be later entitled.

The Court: How could they operate their business? Wouldn't that be another way of issuing an order restraining them from any further operation?

[fol. 409] Mr. Rudenko: I don't know that that would necessarily follow. I assume they have other sources of income.

The Court: With a company that has \$84,000 of capital, of which \$37,000 is good will, and net assets of 47,000, if my recollection serves me—you gentlemen will correct me if I am wrong—there is about \$37,000 in cash. They have their expenses of operation and maintenance, and if I would issue such an order that would prevent them from doing business.

Mr. Rudenko: It may be, but it is perfectly possible that during that time the Pennsylvania Company in the creation of new shares will be taking income from those shares to pay it to the Independence Shares Corporation when that income, under the facts developed before your Honor was never in the contemplation of the plan holders intended to be paid.

The Court: That was the only deduction—I am not making a statement now, I am asking a question—the only deduction now being made and turned over to the Pennsylvania Company would be on account of that \$60, wouldn't it, plus the normal overwrite to each investor of 9 per cent?

Mr. Irwin: 7½ per cent.

The Court: Yes, 7½ per cent.

Mr. Rudenko: Every time a payment is made to the Pennsylvania Company some of that money in some fashion goes to Independence Shares Corporation.

The Court: How much is that likely to amount to in the next month?

Mr. Bohlen: About \$3750. That is exclusive of any \$60 fees; but there isn't very much of that at the present time.

Mr. Rudenko: If that is so, we have the situation of all the plan holders who knew of only the \$60 charge, are being [fol. 410] charged income which is being taken from their shares and paid to Independence Shares while the proceedings are pending.

The Court: Well, I think we are getting down to splitting hairs. I don't see where it will make such a difference in their position where they have three and a half million dollars, which is the approximate value of the holdings of these plan holders; I don't think \$3750 would make such a difference. The \$38,000 amount is a sizeable amount. I think we are getting down to refinements. I hesitate to issue an order which will deprive them of any income and perhaps make it impossible to operate. Someone must be paying the Independence Trust Shares currently, otherwise the Pennsylvania Company could not fulfill its obligation of investing the money. You get back to the starting point, you are getting back to the point where you restrain the company from doing business.

Mr. Rudenko: I don't think so far as—

The Court: I am not going to do that. Would that prevent the company from doing business if you did not get this \$3750?

Mr. Irwin: Yes, if they are prevented from getting any money, we would be simply put out of business.

The Court: I am talking about turning over the 7½ per cent overwrite on the \$50,000. Would that \$3750 have that effect?

Mr. Irwin: If it continues long enough. We have current bills to pay.

The Court: I don't think it will be much more than a month before this matter is finally disposed of—or two months.

Mr. Irwin: If your Honor is contemplating any sum of that kind, I think the bond ought to be at least ten or fifteen thousand dollars, if we are going to be put in that

position, because we are, in effect, your Honor has stated—

[fol. 411] The Court: Would it have any effect of seriously crippling the conduct of their business, or would it just be a question of the 2 per cent they would get on the money if they get it?

Mr. Irwin: It would be a question, as your Honor put it at the time; we had seven thousand dollars in cash. We have certain obligations, we have to keep our payroll, we have to keep people there, we have to pay rent, and those things have to be paid in cash. We depend, to a certain extent, on that cash for our current income. I certainly think, in effect, your Honor has stated what Mr. Rudenko is asking your Honor to do will interfere with our business or cripple us.

The Court: I am not sufficiently familiar with the operations of the business other than in a general way. Where you have a corporation with \$47,000 worth of assets, the loss of, or the temporary postponement of an income of \$3750 per month or \$7500 for two months might cripple one business and it might not affect another business.

Mr. Irwin: If this matter was disposed of in a month, that is true, but this might not be disposed of for six or eight months. I think if Mr. Rudenko wants to have an order of that kind made—and your Honor has indicated your Honor thought it was unnecessary—I think we ought to have a bond of fifteen thousand dollars.

The Court: Your costs of appeal would be the same, it wouldn't cost you any more money to print the paper books; it would be only five or ten pages more.

Mr. Irwin: If this matter is held up at all, if it is held up and not finally disposed of for six months and we were deprived of our cash income for six months or even a year, which is not without the realm of possibility in matters of this kind, it would certainly seriously interfere with us if we were deprived of that income.

The Court: I won't make any order as to the \$60 because there is no question that that was told to every plan holder. [fol. 412] They all understood as to the \$60. As to the 7½ per cent, according to the testimony that was not the case. I don't think it makes much difference in the consideration of the whole case as to whether that order is made or not with respect to the \$3750 or \$7500 for two months, spread among three and a half million dollars. That won't make

much difference. I wouldn't make such an order unless you put up a bond as to that part of it in the sum of \$5000. I will make that order on the condition that a bond in the sum of \$5000 is put up. That will be two bonds because I will make two separate orders. I will make an order as to the \$38,000 which has been discussed, upon the putting up of a \$1000 bond, and I will make an order as to the 7½ per cent, which was to have been turned over by the Pennsylvania Company, for a period of sixty days, at which time application may be made to remove the order, upon the filing of a bond in the sum of \$5000. Unless the bond is filed the order won't be issued.

Mr. Irwin: In that connection, if we find that this matter is extended over a period of one month and possibly for six months, I don't think—

The Court: I made it for sixty days.

Mr. Irwin: In which event we would be enabled to come in—

The Court: It would expire at the end of sixty days.

Mr. Irwin: If the bond of \$5000 is not put up.

The Court: You will frame a decree?

Mr. Rudenko: Yes.

Mr. Irwin: As I understand your Honor on that point—

The Court: I have enjoined you for the next sixty days—I have enjoined the Pennsylvania Company from paying over to you and I have enjoined you from receiving the 7½ [fol. 413] per cent overwrite on payments currently made to the Pennsylvania Company from the date the order is made; from the date the decree is signed.

Mr. Irwin: That will require a bond of \$5000.

The Court: I am making two separate orders. If you agree that the money shall be held by the company, not paid over to you, I won't issue an order. I am trying to save you the embarrassment of having an order made by the Court against your client with respect to these funds. I would rather do it that way. In my opinion it would probably be more advisable in your client's own interest to do it that way. You are counsel for Independence Shares Corporation and it is your duty to advise them as you see fit.

Mr. Irwin: I do want to point out to your Honor that when your source of income, your cash out of which you ordinarily pay your operating expenses is cut off, as it would be by your Honor's order, it might cause irreparable damage.

The Court: It couldn't be irreparable.

Mr. Irwin: It could if we could not pay our rent. We have certain rent obligations, and under the terms of our lease they could claim the entire rent due for the balance of the term.

The Court: I think \$5000 would be substantial.

Mr. Irwin: I think if your Honor is going to make any order of that kind, I see no necessity for it, and as your Honor has pointed out to Mr. Rudenko, I certainly think we ought to have a bond that will protect us.

The Court: I will take your attitude in consideration to that extent; I will make that order for thirty days; \$5000 for thirty days. That will be ample security, in my opinion, it will indemnify you for any loss you may suffer in the event the decision goes against the complaints on that [fol. 414] score. It is more than 100 per cent of the amount you will receive.

Mr. Irwin: It is for thirty days. As I understand it, if I will renew my agreement, or if I make a statement to the Court as to the 38,000, your Honor will make no order of any kind?

The Court: I will make no order if there is a statement by counsel—and that includes counsel for the Pennsylvania Company—with respect to the \$38,000, and with respect to this matter, if there is any statement undertaken by the parties. You should do it by stipulation. In that event, I will make no order.

Mr. Irwin: May I again ask your Honor's indulgence until I talk to my client?

The Court: Certainly.

Mr. Irwin: As I understand it, then, consulting my clients, you will make an order restraining the payment of the thirty-eight thousand and some odd hundred dollars with a bond of \$1000 and that you will make an order as to the payment of the 7½ per cent for thirty days with a bond of \$5000?

The Court: That is correct.

Mr. Irwin: I do not believe that that amount is adequate, but the matter is entirely within your Honor's discretion, of course. I can't agree to any of that, and I assume that before the orders are signed that counsel will submit them for examination?

The Court: Yes.

Mr. Rudenko: Naturally.

Mr. Irwin: And consultation with you?

The Court: Yes.

Mr. Irwin: I do feel in this case that this is another thing that just makes it that much more difficult for us—  
[fol. 415] The Court: I think \$5000, as I said before, is more than 100 per cent of the amount which was likely to have been received; it would probably have been in the neighborhood of \$3750, that being 7½ per cent of \$50,000. By fixing a bond of \$5000 is more than adequate, in my opinion. The \$1000 on the \$38,000 will be in addition.

Mr. Irwin: That restraining order will automatically be eliminated at the end of thirty days unless the matter is renewed before your Honor?

The Court: As to the 7½ per cent, it is for only thirty days; as to the other, it is a restraining order without limit.

Mr. Irwin: We understand that.

The Court: With respect to the other application, I won't grant the application for the various other requests you have made; I will refuse those because you have in some of those paragraphs other requests—I am not going to split them up now; I won't split up all the other requests you have made other than to make these two orders. I will grant you an exception as to that.

Mr. Rudenko: One further thing. I handed your Honor, a moment ago, a letter which was sent by Independence Shares to its plan holders. This is not such a matter of any moment, but I mention it to the Court because I am an officer of the Court. I don't think it is a very wise letter to send out. As an officer of the Court, I would like your Honor to see some of the language in that letter.

The Court: Well, I have read it. There is only one serious criticism I have to make of it, and that is that it has my middle initial incorrect.

Mr. Barba: That is my fault, your Honor.

The Court: I think they felt it was the thing to do. It is up to them. There is nothing criticizable in it. It may be questionable from the standpoint as to whether it is the proper thing to do, to try your case out of Court, but it is [fol. 416] nothing to be upset about; at least, I am not upset about it. I would like to consider it as another expression of free speech on the part of the parties. Even the parties to a litigation have a right to express themselves.

Mr. Rudenko: I am happy your Honor accepts it with more equanimity than I did. I was considerably upset.

The Court: As you get older you get more tolerant. I see nothing to criticize about it. I will make no further comment about it. I don't approve of it, I don't stamp it with my approval. I want you gentlemen to know that. You have no authorization from me to send it out. I don't want you to construe any statements I have made as any authorization by the Court to send out such a letter, although I won't express any criticism of sending it out other than what I have already said. Is there anything else?

Mr. Rudenko: No.

The Court: I will be here today. You may submit the applications and the decrees after consulting with the Pennsylvania Company and the Independence Trust Shares, both Mr. Bohlen and Mr. Irwin.

Mr. Irwin: That will be done promptly tomorrow morning?

Mr. Rudenko: I can't confine myself to any time.

Mr. Irwin: I think it should be done promptly, or tomorrow.

Mr. Rudenko: I will consult with counsel, Harry Shapiro, before I draft the order.

The Court: When will he return?

Mr. Rudenko: He won't return until the end of the week. I will call him on the phone and consult with him.

Mr. Irwin: I think the matter should be done promptly.

The Court: You would want to consult your associate in a similar situation.

[fol. 417] Mr. Irwin: If he is going to confer with his associate—

The Court: You are in no position of complaining on that score because the 7½ per cent will go to you until the order is signed. You should scarcely complain of any delay along that line.

Mr. Irwin: I will say very frankly insofar as the 38,000 might still go to us, but in the light of what your Honor has stated from the bench, I would not consent to the elimination of the order and filing of the bond—

The Court: It is hardly important enough—

Mr. Irwin: Upon that angle, I can assure your Honor

The Court: I am trying to preserve the status quo in this case as far as possible. I would rather do it by agreement of counsel. I have unhesitatingly denied these applications where I thought in the event the matter is disposed

of not in accordance with the petition and requests of the plaintiffs in this case but there might be unpreventable injury done to your clients; I have refused these applications. Where I thought it was necessary for the protection of the investors and plan holders without causing irreparable injury or causing great injury to your client the Independence Shares Corporation, I have made the orders.

Mr. Irwin: I want your Honor to know that when your Honor indicated you were going to do certain things from the bench, I would respect that as the order of the Court.

The Court: I would much rather have taken your word on these things.

Mr. Irwin: I want your Honor to know that.

The Court: You will do that, Mr. Rudenko, as soon as Senator Shapiro gets back?

Mr. Rudenko: Yes.

[fol. 418] Independence Shares Corporation, Balance Sheet  
as at February 28, 1939

Assets

Cash on Hand and in Banks	\$4,118.96
Cash—Depositors Redemption Fund	2,500.00
Cash in Bank—Trustee for Distributors and Salesmen	681.13
	—————
	\$7,300.09
Investments	
1000 Independence Trust Shares at Cost	6,060.59
Less Reserve for Depreciation to 8/31/38	3,600.59
	—————
5 Paoli Bank & Trust Co. at \$14.00 per share	70.00
49.754 Independence Trust Shares at 2.24115 Escrow Account #2	111.50
146.963 Independence Trust Shares at 2.24115 Escrow Account #3	329.34
23.678 Independence Trust Shares at 2.24115 Escrow Account Independence Trust Shares Purchase Plans	73.23
	—————
	584.07

Securities held for sale		
4611 Independence Trust Shares at 2.24115 (of which 150 shares were in Box) . . . . .		10,333.94
Accounts Receivable		
Pennsylvania Company 336 shares account of Independence Trust Shares Purchase Plans . . . . .	885.46	
[fol. 419] Pennsylvania Company 1756 Shares account of Capital Savings Plan Contracts . . . . .	4,888.72	
Pennsylvania Company 200 shares account of National Plan . . . . .	530.43	
Others . . . . .		6,304.61
Stock Transfer Stamps on hand . . . . .	5.00	2,630.49
Documentary Stamps on Hand . . . . .	19.46	
Postage on Hand . . . . .	401.71	
Dividends Receivable . . . . .		426.17
Prepaid & Deferred Charges . . . . .		239.25
Deferred Stationery, Printing & Supplies . . . . .	3,446.91	
Deferred Insurance . . . . .	121.73	
Deferred Traveling & Entertain- ment . . . . .	25.00	
Prepaid Salaries . . . . .	485.00	
Deferred Membership Fees, etc. . . . .	25.00	
Furn-ture & Fixtures . . . . .		4,103.64
Less Reserve for Depreciation . . . . .	13,627.89	
Less Reserve for Depreciation . . . . .	4,244.61	
Advances to Distributors & Salesmen . . . . .	9,383.28	
Less Reserve for Unsecured Ac- counts . . . . .	36,311.92	
Less Reserve for Unsecured Ac- counts . . . . .	33,471.70	
Good Will (through Merger with Capital Savings Plan, Inc.) . . . . .	2,840.22	
		37,759.14
		\$84,364.90

[fol. 420]

## Liabilities

## Accounts Payable

Salesmen's Credit Balances	\$ 681.13
United States Corporation Company	885.92
Birnbaum-Jackson Company	622.41
Jr. R. McFetridge & Son	949.50
	<u>\$3,138.96</u>

Underlying Securities Purchased for creation of 5,000 Independence Trust Shares

10,902.18

Dividend Accumulations on creation of above Shares

17.25

10,919.43

1753 Independence Trust Shares due from miscellaneous brokers

4,006.19

Dividends Payable to Pennsylvania Company, Trustee and/or Custodian

916.80

## Accrued Items

Accrued for Auditing	1,060.00
Accrued for Federal Old Age Benefit Taxes (Employees)	56.70
Accrued for Federal Old Age Benefit Taxes (Employees Contributions)	56.88
Accrued for Federal Old Age Benefit Taxes (Salesmen)	50.67
Accrued for Unemployment Taxes (Salesmen)	152.02
Accrued for Unemployment Taxes (Employees)	176.66
Accrued for Salaries Payable	237.42
	<u>1,790.35</u>

[fol. 421] Reserves

For Federal and State Capital Stock Taxes	121.88
Price adjustment on Independence Trust Shares	43.68
	<u>170.56</u>

Commissions Payable		
National Plan, Inc.	121.41	
Service Commissions	226.30	
		347.71
Capital Stock		
1500 Shares authorized		
1038 Shares outstanding with a stated value of \$65 per share	68,770.00	
Operating Losses		
September 1938	1,091.31	*
November 1938	1,475.23	*
December 1938	2,000.03	*
January 1939		
(Merged Companies)	1,446.63	*
February 1939		
(Merged Companies)	597.72	*
	6,610.92	*
Less Profit October 1938	915.82	
	5,695.10	*
	63,074.90	
		\$84,364.90

[fol. 422] IN UNITED STATES DISTRICT COURT

OPINION

Sur Application for the Appointment of a Receiver,  
Sur Motions to Dismiss Bill of Complaint

Filed May 18, 1939

KALODNER, J.:

The complainants are owners and holders of certain contract certificates purchased from Capital Savings Plan, Inc., since merged with and now Independence Shares Corporation, a Pennsylvania corporation.

The principal defendant is the Independence Shares Corporation, a trust and investment corporation, organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business in Philadelphia. The individual de-

\* Red in the original.

defendants are officers and directors of the Independence Shares Corporation.

The Pennsylvania Company for Insurances on Lives and Granting Annuities is a banking corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business in Philadelphia. The Pennsylvania Company, &c. is trustee under several agreements between the trustee and the Independence Shares Corporation and certain of its predecessor companies.

The complainants seek the appointment of a receiver for the Independence Shares Corporation, with full power and authority to take into possession all the property and assets of the Independence Shares Corporation, and the trust assets held by The Pennsylvania Company, &c., under its agreements with the Independence Shares Corporation. They also seek determination of liabilities, liquidation and distribution and dissolution of Independence Shares Corporation.

The complainants ground their action on alleged misrepresentation and fraudulent statements made to them [fol. 423] at the time they purchased Capital Savings Plan contract certificates from the predecessor of the Independent Shares Corporation. They aver that they and other plan holders have been, and are being, defrauded by the Independence Shares Corporation.

The complainant also avers that the Independence Shares Corporation is insolvent.

The jurisdiction of this court is invoked under its general equitable and receivership powers, and under Section 22 (a) of the Act of Congress of May 27, 1933, entitled the "Securities Act of 1933," as amended and supplemented, (Act of May 27, 1933, c. 38, Title 1, Section 22 (a), 48 Stat. 86 (a), U. S. C. Title 15, Section 77V (a)).

As previously stated, the principal offices of the Independence Shares Corporation, and of The Pennsylvania Company, &c., are within the Eastern District of Pennsylvania. All the individual defendants are residents of the Eastern District of Pennsylvania.

Eight of the nine complainants are residents of the Eastern District of Pennsylvania. The ninth complainant, Abe Zubrow, is a resident of the State of New Jersey. All the complainants individually own \$2000 contract certifi-

cates, on which sums ranging from \$80 to \$500 have been paid in installments.

Prior to December 31, 1938, the Independence Shares Corporation was a wholly owned subsidiary of Capital Savings Plan, Inc. The officers and directors of the two corporations were substantially the same. On December 31, 1938, there was a merger of Capital Savings Plan, Inc., and Independence Shares Corporation, under which the latter acquired all of the liabilities, assets, functions, and business of Capital Savings Plan, Inc., which was an investment and trust corporation, organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Capital Savings Plan, Inc., was originally incorporated in Pennsylvania on October 15, 1931.

[fol. 424] Independence Trust Shares registered with the Securities and Exchange Commission prior to the merger of the two companies on May 2, 1938, under the Securities Act of 1933. The registration was with respect to Independence Trust Shares Purchase Plans, providing for maximum aggregate payments of \$6,720,000, with a maximum of 5600 Monthly Payment Plans, and \$480,000 under a maximum of 960 Full Paid Plans.

From January, 1932 to April, 1938, and under three different trust agreements, the defendant Capital Savings Plan, Inc., issued and sold to members of the public residing in the Eastern District of Pennsylvania and elsewhere, securities, namely Capital Savings Plan Contract Certificates, which are participations in an investment trust or scheme commonly known as an "Installment Investment Plan," for which The Pennsylvania Company, &c. is trustee and defendant Capital Savings Plan, Inc. was sponsor and distributor.

These certificates are monthly payment plans issued and sold in unit denominations of \$1200 providing for the payment of \$10 per month on a periodic or installment basis over a period of ten years. They could be purchased in one-half unit of \$600 or any multiple thereof. They could be secured with life insurance protection providing that upon the death of the purchaser the insurance company would pay to the trustee in one lump sum the installment payments remaining unpaid, which sum ranges downward on a \$1200 unit certificate, from \$1190 to \$10.

The trustee upon receipt of each periodic or installment payment deducted and still deducts the various fees and charges. The fees include a service fee of \$60 on a \$10 per month unit certificate, deducted from the equivalent of the first nine monthly payments; a trustee fee of 25 cents per \$10 payment or fraction thereof, deducted from each monthly payment; and, on installment payment plans with insurance, an insurance fee deducted in decreasing amounts from each monthly payment.

[fol. 425] The remaining balance after fees and charges are deducted was and is used by the trustee at the direction of the defendant Independence Shares Corporation and its predecessor, Capital Savings Plan, Inc., to acquire from defendant Independence Shares Corporation, Independence Trust Shares for the account of each purchaser. These shares are interests in an installment investment trust for which The Pennsylvania Company, &c. is trustee and of which defendant Independence Shares Corporation is issuer, sponsor and depositor.

Each Independence Trust Share represents a 1/1000th interest in a deposit unit previously created by defendant Independence Shares Corporation with funds borrowed or supplied by it. The deposit unit consists of one share each of the common stock of forty-two corporations and cash accumulations to the proper proportion of a distribution account. The price at which Independence Trust Shares were and are sold to the Trustee for the account of the purchasers of Capital Savings Plan Contract Certificates was not and is not the actual creation cost of each share, but was and is computed upon the last sales price of each of the forty-two common stocks which make up the deposit unit, as of the day before the Trustee makes the purchase, to which was and is added odd-lot brokerage, commissions and taxes. To the total of this was and is added an arbitrary charge or load of 9 per cent. (now reduced to 7½ per cent) and any distributable accumulations which may then be applicable to the deposit unit. This 9 per cent arbitrary charge or load was divided, 1½ per cent to defendant Independence Shares Corporation and 7½ per cent to the defendant Capital Savings Plan, Inc., and was a source of income to the defendant Capital Savings Plan, Inc., through the ten-year term in addition to the \$60 service charge which is deducted from the first nine payments or their equivalent. Independence Trust Shares were and are sub-

ject to an additional charge of 2½ per cent of currently distributable income and currently distributable principal, [fol. 426] which charge is deducted semi-annually and paid to the trustee.

The Installment Investment Plan of Capital Savings Plan, Inc. was in effect a trust upon a trust, with two sets of trustees' fees, and with two sets of sponsors' fees, expenses, charges and other costs of operation deducted from the moneys paid in by the purchasers and from the earnings derived from the underlying common stocks in the portfolio of Independence Trust Shares. The Independence Trust Shares purchased by the trustee are held in a common portfolio, but the account of each purchaser is credited with the shares or fractional shares to which he is entitled. At any time the purchaser may receive the Independence Trust Shares which are credited to his account or the liquidating value thereof in cash. The liquidating value of each share was and is computed at the bid price maintained by defendant Independence Shares Corporation and was and is based upon the market bid price of the forty-two common stocks underlying the shares plus the applicable portion of the distributable accumulations and less odd-lot brokerage, commissions and taxes. This price is customarily approximately 10 per cent less than the then offering price of the shares.

Defendant Independence Shares Corporation maintains offices in Philadelphia and Pittsburgh, Pennsylvania, and has general agencies in other cities and subdivisions of Pennsylvania. Defendant Independence Shares Corporation is represented, and its certificates were offered and sold in defined territories, by junior salesmen, senior salesmen and general agents. Their sole remuneration is dependent upon commissions, and overriding commissions, based upon the amount of certificates sold, the initial commission being payable only after delivery of the certificates and being contingent thereafter upon receipt by the trustee of subsequent installment payments. Many of the salesmen were part-time representatives, such as office workers, public employees, factory workers, school teachers and insurance salesmen.

[fol. 427] The offer and sale of Capital Savings Plan Contract Certificates was discontinued on April 9, 1938. However, the holders of approximately 95 per cent of all the outstanding Capital Savings Plan Contract Certificates are

continuing and will continue to send in their periodic cash installments to the trustee, for the purchase of Independence Trust Shares, and the trustee uses and will continue to use the aggregate of these periodic cash installments to purchase Independence Trust Shares from defendant Independence Shares Corporation for the accounts of said holders.

On May 2, 1938 defendant Independence Shares Corporation filed with the Securities and Exchange Commission a registration statement covering a new issue of Independence Trust Shares to be used as the underlying medium of investment for all Capital Savings Plan Contract Certificates outstanding, and as the underlying medium of investment for a new issue of certificates called Independence Trust Shares Purchase Plans. A registration statement covering these latter certificates was filed by Independence Shares Corporation on May 19, 1938.

The Independence Trust Shares Purchase Plans are participations in an investment trust or scheme commonly known as an "Installment Investment Plan," for which The Pennsylvania Company, &c. is custodian and defendant Independence Shares Corporation is sponsor. They are substantially similar to the Capital Savings Plan Contract Certificates issued and sold by Capital Savings Plan, Inc., during the period December, 1932 through April 9, 1938. By contract dated May 14, 1938 defendant Capital Savings Plan, Inc., was underwriter for and had the exclusive right until January 1, 1939 to offer, sell and distribute Independence Trust Shares Purchase Plans.

After January 1, 1939, Independence Shares Corporation itself sponsored, issued and sold Independence Trust Shares Purchase Plans, taking over and using substantially the same sales persons, selling organization and selling practices of Capital Savings Plan, Inc. Defendant Independence Shares Corporation absorbed the assets, liabilities and functions of Capital Savings Plan, Inc. and Capital Savings Plan, Inc. was dissolved.

The following is an excerpt from the Prospectus (June 8, 1938; also January 3, 1939) issued by the Independence Shares Corporation:

"The Independence Trust Shares Purchase Plan is a systematic program by means of which an individual may purchase Independence Trust Shares and thus acquire an in-

terest in a well-diversified list of representative American corporations.

"Independence Trust Shares are shares of an investment trust of the fixed type issued under an Agreement and Declaration of Trust dated as of April 2, 1930 entered into between the Sponsor of these Plans and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, which Agreement and Declaration of Trust is entirely separate from the Independence Trust Shares Purchase Plans. The Independence Trust Shares are created in units of 1000 shares by depositing with the Trustee one share of the common stocks of each of 42 corporations and cash accumulation to the proper proportion of a distribution account. Each Independence Trust Share, therefore, represents 1/1000th interest in one share of each of the 42 corporations and a proportionate interest in the distribution account. The 42 corporations include banks, railroads, oil companies, utilities, industrial companies and insurance companies, a complete list of which will be found in the Prospectus relating to Independence Trust Shares which is attached to this Prospectus. These corporations were chosen for their comparative stability of earning power and for their future possibilities."

The above excerpt, it will be noted, describes the Independence Trust Shares as "an investment trust of the fixed type." The "fixed type" of trust has a fixed list of securities [fol. 429] which the management cannot change. This description of the "fixed type" in the Prospectus is at variance with the description of the nature of the trust shares given by the President of the Independence Shares Corporation, and by counsel for The Pennsylvania Company, &c., in the preliminary hearing of this complaint. The President of Independence Shares Corporation, Alfred H. Geary (pages 120-121, notes of testimony), described the trust shares as "an investment trust of the semi-fixed type." The "semi-fixed type" trust is one with a fixed list of securities, with the management allowed to eliminate those securities which in their judgment are insecure, but not to add others; they must stay within the fixed list for all their investments.

Francis H. Bohlen, Jr., Esquire, counsel for The Pennsylvania Company, &c. (page 56, notes of testimony) described the trust shares as a "limited" management type, and as a "fixed trust subject only to limitations."

It may be appropriate to say at this point that there are some 20,000 plan holders who have paid in approximately \$4,000,000.

As above stated, the Independence Shares Corporation registered with the Securities and Exchange Commission in 1938. Subsequent to the registration, on June 22, 1938, the Securities and Exchange Commission filed a complaint against the Capital Savings Plan, Inc., and the Independence Shares Corporation, alleging that:

"for at least three years last past the defendant, Capital Savings Plan, Inc., has engaged, and is now engaging, and the Independence Shares Corporation is about to engage, in acts and practices which constitute violations of Section 17 (a) of the Securities Act of 1933."

The complaint asked that the two defendants named, and:

"their officers, agents, employees, and sales personnel be enjoined and restrained from \* \* \* obtaining money or [fol. 430] property by means of untrue statements of material facts or omissions to state facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and particularly concerning:

"(a) Any comparison of the operation of the plan to the operation of a savings bank account or other type of deposit account.

"(b) The extent to which and the time or times at which a purchaser may liquidate his securities or otherwise obtain the return of moneys paid in.

"(c) The worth or liquidating value of the security at the end of 10 years or after a total of 120 payments have been completed or at any other time subsequent to the purchase thereof.

"(d) The relation of The Pennsylvania Company for Insurances on Lives and Granting Annuities or any other trustee to the defendants or to the operation of the plan, or the responsibility of such company or any other trustee under the plan.

"(e) Any guarantees or assurances of profit or against loss inherent in or attached to the security or any opportunities afforded thereunder.

"(f) The life insurance feature of the plan.

"(g) The nature and the character of the operation of the plan as a medium of investment or method for the installment or periodic purchase of trust shares or the manner in which moneys paid in thereon by purchasers thereof are invested in common stocks or the amount and percentage of all charges, fees, commissions and costs which are deducted from said moneys prior to such investment or from the income or return of principal of such investment.

[fol. 431] "or any other untrue statements of material facts or omissions to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they are made not misleading, similar to those specifically set forth above or of similar purport or object."

After answer filed, making general denial, the Capital Savings Plan, Inc., and Independence Shares Corporation joined with the Securities and Exchange Commission in a consent decree June 23, 1938, restraining the two corporations from engaging in the practices complained of by the Commission.

In essence, the instant proceeding is based on the same grounds as was set forth in the 1938 Securities and Exchange Commission complaint. The testimony adduced at five of six hearings held in the instant case overwhelmingly substantiates the allegations in the two proceedings.

Before discussing this testimony and evidence, it is necessary to dispose of a motion to dismiss filed by the Independence Shares Corporation, and the individual defendants, and a motion to dismiss filed by The Pennsylvania Company, &c.

I shall consider the two motions in the order named.

Independence Shares Corporation and the individual defendants moved to dismiss upon the grounds;

(a) That the amount in controversy is less than \$3,000;

(b) That there was no the requisite diversity of citizenship; and

(c) That there is no jurisdiction in equity or for the appointment of a receiver because the complainants were unsecured simple contract creditors who had not reduced

their claims to judgment and failed to realize upon execution process.

All these contentions are without merit.

Paragraph 1 of the bill of complaint contains jurisdictional averments stating that relief is sought under, inter [fol. 432] alia, Section 22 (a) of the Securities Act of 1933, as amended and supplemented, Being the Act of May 27, 1933, Chapter 38, Title 1, Section 22 (a); 48 Stat. 86 (a), U. S. C. Title 15, Section 77V (a). The section referred to reads as follows:

"(a) The district courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

It becomes necessary in this connection to consider Chapter 38, Title 1, Section 12 of the Act (15 U. S. C. A. 77L) which reads:

"Any person who—

"(1) sells a security in violation of section 77e, or  
" (2) sells a security (whether or not exempted by the provisions of section 77e, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not [fol. 433] knowing of such untruth or omission), and who

shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

And finally, Chapter 38, Title 1, Section 16, of the Act (15 U. S. C. A. Section 77p):

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

It is evident that the allegations of the bill, which are assumed to be true for the purposes of the discussion of the motions to dismiss, bring the complaint within the provisions of the law quoted. For, according to those allegations, these defendants sold securities by means of a prospectus or oral communication, both of which included untrue statements of material facts or omitted to state material facts necessary to make the statements not misleading: wherefore under Section 12 they are liable to the purchaser for the amount of the consideration paid, with interest.

It is not necessary to look beyond this particular statute for jurisdiction in this court upon the allegations in the bill. Section 16, already quoted, provides specifically that the rights and remedies provided by the subchapter (Chapter 38, Title 1) "shall be in addition to any and all other rights and remedies that may exist at law or in equity." It becomes a matter of no moment, therefore, whether or not diversity of citizenship exists, and whether or not the amount in controversy exceeds \$3000 exclusive of interest [fol. 434] and costs, and it is unnecessary to pass upon those questions: see Wyman v. Wallace, 201 U. S. 230, 50 L. Ed. 738; Sterdle v. Reading Company (C. C. A. 3), 24 F. (2d) 299, 301; Slaymaker Lock Co. v. Reese (D. C. E. D. Pa.) 24 F. Supp. 69, 73: where suits arising under the laws of the United States were entertained by Federal courts despite the lack of diversity of citizenship.

We pass now to the other question raised by the motion to dismiss: that complainants are not entitled to come into equity because they are unsecured simple contract creditors who have neither obtained judgments nor issued executions thereupon.

The fallacy in this contention lies in the assumption that the complainants are unsecured simple contract creditors. They are not.

This is a class bill. The class is composed of the various persons who have subscribed to the investment plans of Independence Shares Corporation, and of Capital Savings Plan, Inc., now merged with the former. The Pennsylvania Company, &c. holds legal title to a vast amount of securities for the benefit of the subscribers. Specific, substantial rights in this property—the securities—are given to the purchasers. The following is culled from the Prospectus (January 3, 1939):

#### **"Rights of Purchasers"**

##### **"Applicable to All Plans:**

**"(1) Remittance of Distributions:** A Purchaser may from time to time instruct the Custodian to remit the distributions upon his Trust Shares and may subsequently direct that future distributions be applied to the purchase of Trust Shares.

**"(2) Partial Withdrawal:** A Purchaser may at any time withdraw part of his Trust Shares or direct the Custodian in writing to sell part of his Trust Shares and remit the net [fol. 435] proceeds. Subsequently and at any time prior to complete withdrawal, such Purchaser has the right to rede-  
liver to the Custodian the Shares withdrawn to be held for his account.

**"(3) Complete Withdrawal:** A Purchaser may at any time terminate his Plan by surrendering the same to the Custodian with written instructions either to deliver his Trust Shares to him or upon his order or to sell his Trust Shares and remit the net proceeds to him or upon his order. If the Purchaser directs the delivery of his Trust Shares, sufficient Trust Shares and fractions thereof will be sold to pay all authorized deductions and leave no fractional Trust Shares, and the net balance will be paid in cash.

**"(4) Continuation of Custodianship:** After a Purchaser has completed his payments he may permit the Custodian

to retain custody of his Trust Shares, either applying distributions to the purchase of additional Trust Shares or remitting the same.

"(5) Transfers: A Purchaser may (a) transfer his right, title and interest in and to his Trust Shares to another person, acceptable to the Sponsor and the Custodian, who has made application for the delivery of a similar Purchase Plan; (b) transfer his right, title and interest in and to his Trust Shares to another person who may only exercise the right of complete withdrawal; or (c) execute and file with the Custodian a declaration of trust, declaring that he holds his right, title and interest in and to his Trust Shares for the benefit of another person or persons."

It is clear, therefore, that regardless of the fact that The Pennsylvania Company, &c. is denominated in the Pros- [fol. 436] pectus "a custodian": and regardless of the nature of the written agreement between The Pennsylvania Company, &c. and the Independence Shares Corporation (by virtue of which The Pennsylvania Company, &c. holds the title to the securities): nevertheless, The Pennsylvania Company, &c. holds the securities, not for itself, but as a trust: the trust is for the benefit of the subscribers or purchasers whose money bought those securities; and the subscribers or purchasers (the complainants as a class) are in consequence the cestuis que trustent.

While it is true that as a general rule unsecured simple contract creditors who have not obtained judgments upon their claims have not the status to appeal to equity for relief, that situation does not exist here and the rule is not applicable. The complainants are beneficiaries of a trust. Regarded as such they have, in instituting proceedings in equity, appealed to the proper forum for redress of the alleged wrongs: see Case v. New Orleans, 101 U. S. 689, 25 L. Ed. 1004:

"It is, no doubt, generally true that a creditor's bill, to subject his debtor's interests in property to the payment of the debt, must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned nulla bona. The reason is, that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary; or, in other words, that the creditor is remediless at law.

"But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, 'Bona, sed impossibilia non cogit lex.' It has been [fol. 437] decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner v. Adams*, 46 Mo., 95; *Postlewait v. Howes*, 3 Iowa, 365; *Bk. v. Harvey*, 16 Iowa, 141; *Botsford v. Beers*, 11 Conn., 369; *Payne v. Sheldon*, 63 Barb., 169. This is certainly true where the creditor has a lien or a trust in his favor. • • •

"But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 N. H., 311; *Holt v. Bancroft*, 30 Ala., 193."

To the same effect is *Wyman v. Wallace*, *supra*, where jurisdiction was taken of a creditor's bill in equity without judgments having first been obtained by the creditors. A fuller discussion of the law is afforded in the opinion of the Circuit Court in the same case, reported in 135 F. 286, at page 292 et seq., accompanied by a citation of authorities. The Circuit Court said (page 292):

"A suit for the enforcement of a lien or for the enforcement and administration of a trust is one peculiarly of equitable cognizance, and may be maintained by a contract creditor whose demand has not been reduced to judgment. *Day v. Washburn*, 24 Haw. 352, 16 L. Ed. 712; *Case v. Beau-regard*, 101 U. S. 688, 25 L. Ed. 1004; *Townsend v. Vanderwerker*, 160 U. S. 171, 178, 16 Sup. Ct. 258, 40 L. Ed. 383; *Clews v. Jamieson*, 182 U. S. 461, 478, 21 Sup. Ct. 845, 45 L. Ed. 1183. In *Oelrichs v. Spain*, 82 U. S. 211, 21 L. Ed. 43, the court said that whenever an element of trust existed jurisdiction in equity was always conferred. In these respects the case at bar differs from those cited by the appellants. [fol. 438] *Jones v. Green*, 68 U. S. 330, 17 L. Ed. 553; *Smith v. R. Co.*, 99 U. S. 398, 25 L. Ed. 437; *Scott v. Neely*,

140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Nat. Tube Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; Hollins v. Brierfield Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113."

It is to be noted that in the above excerpt the Circuit Court specifically distinguished Hollins v. Brierfield Co., relied upon by the defendants herein.

The same conclusions are reached in Merchants' National Bank et al. v. Chattanooga Construction Company, 53 F. 314, 317, where it was said:

"It seems to me that this bill does not fall within any case in which it has been held that a judgment at law, or return of execution nulla bona, or both, is necessary to maintain the bill. It is not an effort to reach equitable assets merely. \* \* \* In the case of Stutz v. Handley, 41 Fed. Rep. 537, the court says of that suit; 'Its object being to reach and subject a trust fund, complainants were not even required to have reduced their claims to judgment, and exhausted their remedy at law, after the insolvency of the company; citing Case v. Beauregard, 101 U. S. 688-690.'"

The defendants cannot, therefore, prevail in their contention that the complainants have not the right to seek relief in a court of equity.

As for the prayer that a receiver be appointed: "The appointment of a receiver is merely an ancillary incidental remedy": Gordon v. Washington, 295 U. S. 30, 79 L. Ed. 1282; Pusey & Jones v. Hansen, 261 U. S. 491, 497; Burton v. Carey, 82 F. (2d) 657.

In Cooke v. Flagg (C. C. A. 2) 233 F. 426, the court, after stating that a trust existed because the defendant, having obtained money through fraudulent misrepresentations, had become a trustee ex maleficio, justified the ap[fol. 439] pointment of a receiver by the court below on the ground that it was imperative to safeguard the corpus of the trust.

Passing now to the similar motion to dismiss on behalf of The Pennsylvania Co. &c., it is sufficient to say that this case differs entirely from that of Gordon v. Washington, 295 U. S. 30. There, the Secretary of Banking had taken over a bank, and the Supreme Court held specifically that "The Secretary has the status of an equity receiver re-

sponsible to the court" in which he had filed a certificate of possession. True, there is no charge here that The Pennsylvania Company, &c. has been guilty of any misconduct, neglect or mismanagement and no testimony thereof. The Pennsylvania Company, &c., however, has not the status of an equity receiver responsible to any court. And, if the funds in its hands are to be preserved or distributed for creditors in the instant proceeding, that must be done by an arm of the court—a receiver appointed by the court and responsible to it.

A receiver will be appointed by the court to take possession of the subject matter of the trust or a part thereof, and to administer the trust in respect thereto, if this is necessary for the protection of the interests of the beneficiaries. This is one of the equitable remedies available to the beneficiary or beneficiaries of a trust: See Restatement of the Law on Trusts, Section 199, Chapter 7.

For the reasons stated, the defendants' separate motions to dismiss are refused.

As to the merits:

As previously stated, the testimony overwhelmingly substantiated the allegations in the bill of complaint that there were untrue statements made to purchasers in the sale of contract certificates, and that there was concealment of fact, of which untruths and concealments the purchasers were unaware.

Taken as a whole, the testimony and exhibits offered in evidence disclosed, in summary:

(1) That the Independence Shares Corporation, and its predecessor, the Capital Savings Plan, Inc., furnished salesmen with written instructions as to methods and material to be used by them in selling the contract certificates.

(2) That said written instructions contained and suggested the use of untrue statements of material facts and the omissions of vitally important relevant facts.

(3) That officers of the Independence Shares Corporation, and its predecessor, gave verbal instructions to salesmen which contained and suggested the use of untrue statements of material facts and the omissions of vitally important relevant facts.

- (4) That the Independence Shares Corporation, and its predecessor, employed salesmen from every walk of life without necessary and proper qualifications, and solely because of the fact that they were in a position to sell fellow employees, relatives, friends, neighbors, and persons with whom they enjoyed business relations.
- (5) That purchasers were told that the plan was a "savings" plan; that the plan was comparable to a savings bank account but paying a higher rate of interest.
- (6) That purchasers were told The Pennsylvania Company, &c. was the "backer" of the contract certificates.
- (7) That purchasers were told that The Pennsylvania Company, &c. "guaranteed" \$2000 for every \$1200 paid in over a ten-year period at the end of ten years.
- (8) That purchasers were told \$60 was the sole "service charge," when, in fact, \$60 was the initial service charge, and there were other charges including a nine per cent overwriting collected by the Independence Shares Corporation, and its predecessor, on all shares placed in the investment portfolio of the plan purchaser (the nine per cent overwriting now reduced to seven and one-half per cent).
- (9) That purchasers were told The Pennsylvania Company, &c. was in sole and complete control of the "investment" of funds paid in by the contract plan purchasers.
- [fol. 441] (10) That there was misstatement and concealment of material facts relating to the life insurance features of the plan.
- (11) That purchasers were told that money paid in could be withdrawn in full at any time, or after definite periods variously represented to be one, two, or three years.
- (12) That purchasers were told the trustee's agreement (the agreement between the Independence Shares Corporation and its predecessor, and The Pennsylvania Company, &c.) "guaranteed" \$2000 for every \$1200 paid in in ten years.
- (13) That there was a concealment of charges made by the Independence Shares Corporation and its predecessor.
- (14) That the Independence Shares Corporation maintained its own trading department to "make" a market for

Independence Trust Shares, which were re-sold at a seven and one-half per cent mark-up to plan holders.

First as to the exhibits referred to. They included bulletins prepared by the Burton Bigelow Sales Coaching Clinic, at the request of the Capital Savings Plan, Inc. They contain instructions and suggestions to salesmen employed by Capital Savings Plan, Inc. These bulletins were of the familiar "high-pressure" sales type.

Just a few examples:

"Bulletin No. 7—Every Earner is a Prospect! Don't Be Afraid to Cold Canvass."

"Bulletin No. 8—Making The Successful CSP Approach."

"Bulletin No. 9—Avoiding the 'Premature Exit' or 'Ease-Out' Before You Have Told Your Story."

"Bulletin No. 10—Separating the 'Suspects' from the Prospects."

"Bulletin No. 11—Emptying the Prospect's Bucket of Present Satisfaction."

[fol. 442] "Bulletin No. 12—Using the Re-Hook Question."

"Bulletin No. 13—Re-Filling the Prospect's Bucket With Desire Points."

"Bulletin No. 14—Picturizing Future Life Money Needs."

"Bulletin No. 16—Eight Ways for Handling CSP Resistances."

"Bulletin No. 17—'The Words in Your Mouth—' Exactly What to Say When Handling the Most Frequently Met CSP Resistors."

"Bulletin No. 18—'The Words in Your Mouth—#2' Exactly What to Say When Handling the Most Frequently Met CSP Resistors."

The titles of these bulletins are eloquent evidence of the sales methods used by the defendant, Independence Shares Corporation, and its predecessor.

Plan holder after plan holder testified that the sales methods outlined in these bulletins were used on them to make sales.

Miss Agnes Landon, a plan holder, testified (page 192, notes of testimony):

"A. He (the salesman) told me the Pennsylvania Company were trustees for this plan, that it positively could not go wrong because the Pennsylvania Company were backing them up in every way, shape and form."

The same witness also testified (page 190, notes of testimony) :

"A. I can't tell you everything he told me, because he talked very nearly an hour, but he did make it very clear to me that the Pennsylvania Company were the trustees for this affair. I was very much impressed by it being the Pennsylvania Company because at that time I had a trust fund there, which I still have, and that was the inducement [fol. 443] of my taking these shares, because of the Pennsylvania Company . . . He told me at the end of ten years after depositing \$1200 with the Capital Savings Fund that I was to get \$2000."

Again (page 192, notes of testimony) :

"A. Oh, yes, I asked him if it was something similar to a building and loan. He said they were better than a building and loan because a building and loan sometimes doesn't run out for eleven or twelve years, but this positively would be paid back to me in ten years."

By the Court:

"Q. What do you mean?"

"A. The \$2000 was to be paid to me in ten years."

Anthony Picone, a shoemaker, incidentally, who bought two plans, testified (page 199, notes of testimony) :

"A. Yes, he told me the Pennsylvania Company was in back of it."

"Q. Did you know who they were, the Pennsylvania Company?"

"A. Well, I heard about it, it was a bank of great reputation."

Mrs. Grace Picone, whose husband was a plan holder, testified (page 202, notes of testimony) :

"A. He (the salesman) said the Pennsylvania Company was in back of it . . ."

Miss Jean Fitch, a plan holder, testified that a co-employee in a local department store was also a salesman for the defendant, Independence Shares Corporation, and stated further (page 219, notes of testimony) :

"A. The salesman told me that the Pennsylvania Company was in charge of the money and they were backing the money up."

Miss Laura Burdette, a saleswoman for the Capital Savings Plan, Inc., testified (page 228, notes of testimony) that she was employed:

[fol. 444] "A. To go out and sell it to other people; anybody that wanted to buy it."

Miss Burdette stated that she was coached by a Mrs. Jane T. Balanos, a general agent of Capital Savings Plan, Inc. Her testimony (page 231, notes of testimony) is illuminating:

"Q. What did she (Mrs. Balanos) tell you about the plan, and what to tell the customers?"

"A. She told me to go out and tell the customers that this Capital Savings Plan was a very good investment, it was better than a bank, it was better than a building and loan, it was better than anything on the earth, and it had forty-two of the best companies in the country that were backing it up. The Pennsylvania Company was supposed—was one of the companies, one of the banks that was backing it up, very, very much. I was supposed to emphasize that above everything else."

By the Court:

"Q. You say 'supposed to emphasize'; were you told to emphasize it?"

"A. I was."

"Q. That the Pennsylvania Company was one of the backers?"

"A. Yes. \* \* \*"

Miss Burdette also testified that Frank C. McCown, vice-president of the defendant, Independence Shares Corporation, and its predecessor, was present at the conversation with Mrs. Balanos, when she received sales instructions (page 233, notes of testimony).

In connection with this incident, Miss Burdette testified that McCown told her not to say that the plan would run out in ten years, but that (page 234, notes of testimony):

[fol. 445] "A. Mr. McCown said, 'You don't sell it that way. Tell the people in seven and a half years they are going to get \$2000.'"

By the Court:

"Q. In seven and a half years on a \$10 payment per month?"

"A. That's right, but that was supposed to mature in seven and a half years."

"Q. Did you have any literature in connection with this?"

"A. When I went to sell the people?"

"Q. Yes, with this seven and a half year proposition."

"A. Yes, I did."

"Q. I show you Exhibit C-3."

"A. That is correct."

Incidentally, Miss Burdette, at the time she was employed as a saleswoman, was but 18 years old. She testified that among others whom she sold was a produce peddler.

Another witness, Cosme Balanos, testified (page 275, notes of testimony) that he was employed as a salesman by Capital Savings Plan, Inc.; that the company supplied him with a "sales kit", on the first page of which was a photograph of the doors of The Pennsylvania Company, &c.; that on the inside was a financial statement of The Pennsylvania Company, &c.; that next appeared a letter from a vice-president of The Pennsylvania Company, &c.

The following excerpts from the sales bulletins supplied by the defendant, Independence Shares Corporation, and its predecessor, to salesmen disclose that the misstatements and the concealment of facts which the complainants allege abounded in these bulletins.

For example:

Bulletin No. 13, "Re-Filling The Prospect's Bucket With Desire Points," referring to the payments made by the plan holders, states (page 4):

[fol. 446] "This is *legally safeguarded* by an *old, reliable trustee* and by them proportionately invested in trust shares • • •"

Bulletin No. 16, "Eight Ways for Handling CSP Resistances," states (page 2):

"The *Trustee guarantees* that if you carry your contract to maturity, you will never pay in more than \$1200, and that you will never receive less than \$2000 as its matured value."

Bulletin No. 17, "The Words in Your Mouth—Exactly What to Say When Handling the Most Frequently Met CSP Resistors," states (page 8) :

*"The trust agreement with the Trustee, The Pennsylvania Company guarantees that if you carry your contract to completion and get all its benefits, you cannot possibly invest more than \$1200 for each \$2000 maturity."*

*"The Trustee's agreement likewise guarantees you that you will never get less than \$2000 upon the maturity of your Plan."*

Bulletin No. 18, "The Words in Your Mouth—#2' Exactly What to Say When Handling the Most Frequently Met CSP Resistors," states (page 10) :

*"The Trustee also collects your dividends, reinvests them for you and carries out the provisions of your savings program."*

*"Yet, when you pay the sales person who sold you, the trustee, the operators of CSP—everybody—it costs you only \$60 for each \$2000 maturity."*

Bulletin No. 19, "Making the Successful Close," states (page 4) :

*"There is nothing new about the CSP principle—except the fact that the small man is allowed to get in on it. The [fol. 447] Trustee Bank is 125 years old, the average age of the forty-two corporations is 55 years, and the Plan itself is the fastest-growing Savings Plan in the country."*

*"No need to take my word for anything about this Plan. The forty-two corporations are well-known and their assets and earnings are published regularly. The Trustee is a 125-year old bank with assets of a quarter of a billion dollars. You can look these things up for yourself any time."*

The various Prospectuses also contained misstatements of fact.

For example:

The Prospectus of November 1, 1933 (Exhibit C-1) states on page 5, under the caption "Your Trustee," the following:

*"The Pennsylvania Company for Insurances on Lives and Granting Annuities, founded in 1812, is one of the*

oldest banks in the United States. Its Trust Department is one of the largest in the country.

"The collecting, *investing*, and protecting of your money is entrusted not to Capital Savings Plan, Inc., but to your Trustee.

"If Capital Savings Plan, Inc., and the Trustee went out of existence, your property would be unaffected, for legally it is yours, definitely put aside in trust for you. These funds *cannot be removed* from the safekeeping of the Trustee except by your order, as long as your payments are maintained."

See also the Prospectus (Exhibit C-3) from which the witness Cosme Balanos testified he made sales in 1934. This Prospectus, also under the caption "Your Trustee," states:

"The investing of your money is entrusted not to Capital Savings Plan, Inc., but to your Trustee, The Pennsylvania [fol. 448] Company for Insurances on Lives and Granting Annuities, Philadelphia."

From the same Prospectus:

"Your ownership is the common stocks of these companies is made possible through the purchase by the Trustee of Independence Trust Shares, also *trusteed* and *operated* by the same Trustee."

From the same Prospectus, under the caption "Your Own Trust Fund":

"The \$10 a month which you set aside (you may save more if you care to) is *invested* and *looked after* by one of the country's oldest and most trusted financial institutions, which, as Trustee, receives your money, *invests* it, and *receives* and *reinvests* all your profits for you."

This Prospectus also states, under the caption "The Service Fee":

"The total service fee to Capital Savings Plan, Inc. is \$60 for each \$2000 maturity value contract (\$10 per month) applied for. This is payable out of deductions made during the first year's payments. The Trustee charges \$3 per year—25 cents per month—for each year the contract is in force, up to and including the first ten years."

The application for contract certificates of the Capital Savings Plan, Inc. (Exhibit C-9) also states that \$60 is the maximum service fee, with the only other charge being 25 cents monthly to the trustee.

The Prospectuses time and again aim to sell the "fact" that the plan holder, by subscribing, is entering upon a "savings" program. The very designation "Capital Savings Plan" speaks for itself.

The book given to subscribers, so that entries might be made of their payments, is in the pattern of a bank deposit book (Exhibit 13).

[fol. 449] The testimony of these witnesses, and the bulletins and prospectuses quoted from, give the entire complexion of the methods of salesmanship, the "guarantees" given to plan purchasers, the positive misrepresentations, and the failure to disclose material facts. For example, the statements in Bulletin No. 2 that "*These funds cannot be removed from the safekeeping of the trustee except upon your order,*" and "*This is legally safeguarded by an old, reliable trustee and by them proportionately invested in trust shares . . .*" are absolute misrepresentations.

In this connection the record discloses:

- (1) That The Pennsylvania Company, &c. was a trustee with limited powers (page 57, notes of testimony).
- (2) That management of the Trust Shares and the stock which comprised the Trust Shares is solely in the Independence Shares Corporation, and not in the control of The Pennsylvania Company, &c.
- (3) That the Independence Shares Corporation in its discretion can sell any of the underlying forty-two securities and reinvest the proceeds in shares of the remaining underlying companies.
- (4) That The Pennsylvania Company, &c. does not select the investments.
- (5) That The Pennsylvania Company, &c., does not "guarantee" the safety of the investments, the maturity of the plans, or that the plan holders will receive \$2000 in 10 years or at any other time—in fact, the only duty of The Pennsylvania Company, &c. is the safekeeping or custody of the Trust Shares.

(6) That the statement made in Bulletin No. 18, and by salesmen, "When you pay the sales person who sold you, the trustee, the operators of CSP—everybody—it costs you only \$60 for each \$2000 maturity," is untrue. In addition [fol. 450] to the \$60 charge, there was a nine per cent (now reduced to seven and one-half per cent) "overwriting" or "load" charge made by defendant, Independence Shares Corporation, and its predecessor, on the Trust Shares which went into the plan holder's portfolio. In other words, the subscribing plan holder paid his \$60 service charge, and each dollar he paid in was subjected to the nine per cent (now seven and one-half per cent) overwriting profit made by the sponsor company, Independence Shares Corporation, and its predecessor. In addition, when, as it recently happened, seven of the forty-two underlying securities were sold and the proceeds reinvested in some of the thirty-five remaining underlying securities, there was an additional charge of seven and one-half per cent made with respect to that reinvestment. Also, Independence Trust Shares were subject to an additional charge of two and one-half per cent of currently distributable income and currently distributable principal.

There is also undisputed evidence to the effect that there was misrepresentation as to the cost of life insurance, which was featured as an adjunct of the plan. This misrepresentation, and in some instances concealment, had two aspects:

(1) That plan holders were led to believe that the insurance premium was paid by Independence Shares Corporation.

(2) That, upon the death of the insured, the full \$2000 maturity would be paid over to the plan holder beneficiary—when, as a matter of fact, the insurance was for the unpaid balance of installments due by the insured plan holder.

Reference was made to the recent sale of seven of the forty-two securities constituting the portfolio of Independ- [fol. 451] ence Trust Shares. The testimony disclosed that in February, 1939, upon advice of its investment counsel and upon the adoption of appropriate resolutions by the board of directors, the Independence Shares Corporation

sold seven of the securities in its portfolio. The proceeds of the sale totaled \$662,335.76.

The "values" of these seven securities at the dates they were deposited with the trustee, as determined by Independence Shares Corporation, was \$763,655.33.

The \$763,655.33 was the cost of the securities to the Independence Shares Corporation. The cost to the plan holders was approximately \$820,000.00, since there was a seven and one-half per cent "overwriting" or "load" which the Independence Shares Corporation charged the plan holders (see page 582, notes of testimony).

Consequently, as a result of the sale of these seven securities for \$662,335.76, there was a loss to the plan holders of \$158,000.00.

There was still a further loss to the plan holders in this transaction. Independence Shares Corporation, in re-investing approximately \$550,000.00 of the \$662,000.00 received in the sale (the balance was disbursed in cash to plan holders), charged an "overwriting" or "load" of seven and one-half per cent against this \$550,000.00, or approximately \$40,000.00 (see page 321, notes of testimony).

The net result of the "overwriting" at the time of the original investment; the loss in the sale of the securities, and the second seven and one-half per cent "overwriting" charge, was a loss to the plan holders of close to \$200,000.00—or approximately twenty-five per cent of the amount they paid in.

In discussing this transaction, no criticism is intended of the sale of these seven securities since there was no evidence that there was an abuse of discretion on the part of investment counsel or of the Independence Shares Corporation. With respect to The Pennsylvania Company, &c., [fol. 452] under the terms of the trust agreement with the Independence Shares Corporation, it had no say or part in the sale of the seven securities.

The transaction is cited for two reasons:

(1) As evidencing the fact that the Independence Shares Corporation had, and exercised, sole control of the securities in the trust, and that The Pennsylvania Company, &c. had no control or authority whatsoever over the securities;

(2) That there were overwriting charges made against, and losses suffered by, the plan holders by the exercise of

control and authority lodged in the Independence Shares Corporation, which was not only concealed from the plan holders, but which was deliberately misrepresented to the plan holders (See Bulletin No. 18, page 10: "It costs you only \$60 for each \$2000 maturity": Bulletin No. 2: "These funds cannot be removed from the safekeeping of the trustee except upon your order"; in the same Bulletin: "This is legally safeguarded by an old, reliable trustee and *by them proportionately invested* in trust shares.").

This loss of approximately \$200,000 has another important significance.

According to its latest available financial statement, the Independence Shares Corporation as of February 28, 1939, had total assets of \$84,364. Of the latter amount, \$37,759 was carried as "good will." Deducting the \$37,759 "good will" item, the actual assets of Independence Shares Corporation are approximately \$47,000.

As against the approximately \$47,000 of assets, there existed a contingent liability as of August 31, 1938 of \$3,486,000 with respect to 1,104,869 Independence Trust Shares sold by the Independence Shares Corporation or its predecessor during the period from September 1, 1935 to June 14, 1938. This \$3,486,000 represents actual receipts [fol. 453] by the Independence Shares Corporation or its predecessor from the sale of such Shares.

Final determination that plan holders are entitled to the amount which they have paid in, plus interest, by reason of the fact that there was fraud in the sales made to them, raises the question as to whether it will be possible for the Independence Shares Corporation to satisfy awards made to the plan holders.

As has been stated, there has already been a \$200,000 loss to the plan holders.

The complaint asserts that the Independence Shares Corporation is insolvent. At the very outset of these proceedings the attorneys were advised that in the event the motions to dismiss were denied, and that in the further event that this court was of the opinion that the prayer for the appointment of a receiver should receive further consideration, then the question of solvency or insolvency of the Independence Shares Corporation would be referred to a special master for his investigation and report.

The motions to dismiss having been denied, and the court being of the opinion that there should be further consideration of the prayer for the appointment of a receiver, this matter will be specially referred to John M. Hill, Esquire, as Special Master, to take testimony as to the solvency or insolvency of the Independence Shares Corporation and to make his report to the court at the earliest possible date.

The report of the special master as to the solvency or insolvency of the Independence Shares Corporation will be of material assistance in the final determination of the prayer for the appointment of a receiver.

Further disposition in this proceeding will await the Special Master's report.

[fol. 454] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS TO DISMISS, ETC.—Filed May 18,  
1939

And Now, to wit, the eighteenth day of May, 1939, all motions to dismiss this action are denied, and the above-entitled matter is referred to John M. Hill, Esquire, as Special Master, and the Special Master is hereby ordered, directed and authorized to hear and determine an issue raised in this case, to wit, the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania corporation), and to that end to take and hear testimony bearing upon that issue, the said testimony to be taken by a court stenographer, transcribed and submitted to this Court, together with the report of the Special Master. The said report of the Special Master shall be submitted as expeditiously and promptly as may be possible, and shall contain the Special Master's findings of fact and law upon the question of the solvency or insolvency of the said defendant, together with whatever discussion of law the Master deems proper and necessary. Jurisdiction of this entire case is meanwhile retained by this Court.

By the Court.

(Sgd.) Kalodner, J.

## IN UNITED STATES DISTRICT COURT

EXCEPTIONS TO ORDER—Filed May 25, 1939

And Now this twenty-third day of May, 1939, the defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe 3d, by their attorney, Robert F. Irwin, Jr., take exception to the order of the Court filed in the above as follows:

[fol. 455] "And Now, to wit, the 18th day of May, 1939, all motions to dismiss this action are denied, and the above-entitled matter is referred to John M. Hill, Esquire, as Special Master, and the Special Master is hereby ordered, directed and authorized to hear and determine an issue raised in this case, to wit, the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania Corporation), and to that end to take and hear testimony bearing upon that issue, the said testimony to be taken by a Court Stenographer, transcribed and submitted to this Court, together with the report of the Special Master. The said report of the Special Master shall be submitted as expeditiously and promptly as may be possible, and shall contain the Special Master's findings of fact and law upon the question of the solvency or insolvency of the said defendant, together with whatever discussion of law the Master deems proper and necessary. Jurisdiction of this entire case is meanwhile retained by this Court.

By the Court.

(Sgd.) Kalodner, J."

on the grounds and for the reason that

- (a) The Order denying the motion to dismiss the above action is contrary to law, and
- (b) The Order referring the matter to John M. Hill, Esquire, to determine the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania corporation) is contrary to law and against the evidence presented in this case, it appearing from the record that the uncontradicted testimony shows that the defendant, Independence Shares Corporation (a Pennsylvania corporation) is solvent.

(Sgd.) Robert F. Irwin, Jr., Attorney for Defendants.

[fol. 456] IN UNITED STATES DISTRICT COURT

EXCEPTIONS OF THE PENNSYLVANIA COMPANY FOR INSURANCES  
ON LIVES AND GRANTING ANNUITIES, ONE OF THE DEFEND-  
ANTS—Filed May 24, 1939

And Now, to wit, this twenty-fourth day of May, 1939, comes The Pennsylvania Company for Insurances on Lives and Granting Annuities, one of the defendants in the above entitled action, through its attorneys, Saul, Ewing, Remick & Saul, Esquires, and files the following exceptions:

1. Said defendant excepts to the action of the Court on May 18, 1939, in refusing said defendant's separate motion for dismissal as follows:

"For the reasons stated the Defendants' separate motions to dismiss are refused."

2. Said defendant excepts to the action of the Court in entering an order on May 18, 1939 as follows:

"And Now, to wit, the 18th day of May, 1939, all motions to dismiss this action are denied, and the above-entitled matter is referred to John M. Hill, Esquire, as Special Master, and the Special Master is hereby ordered, directed and authorized to hear and determine an issue raised in this case, to wit, the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania corporation), and to that end to take and hear testimony bearing upon that issue, the said testimony to be taken by a Court Stenographer, transcribed and submitted to this Court, together with the report of the Special Master. The said report of the Special Master shall be submitted as expeditiously and promptly as may be possible, and shall contain the Special Master's findings of fact and law upon the question of the solvency or insolvency of the said defendant, together with whatever discussion of law [fol. 457] the Master deems proper and necessary. Jurisdiction of this entire case is meanwhile retained by this Court.

By The Court: (Sg.) Kalodner, J." Saul, Ewing, Remick & Saul, by Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

## IN UNITED STATES DISTRICT COURT

**AMENDMENT TO CAPTION AND COMPLAINT BY ADDING J. H. VAN SCIVER AS PARTY PLAINTIFF—Filed May 25, 1939**

And Now, to wit, this twenty-fourth day of May, 1939, the caption of the above entitled matter is amended by adding thereto J. H. Van Sciver as party plaintiff and by amending the complaint by adding thereto paragraph 12(a) as follows:

12(a). J. H. Van Sciver is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate No. B5110 in the sum of \$4000 dated October 19, 1932 and Capital Savings Plan Contract Certificate No. B7309 in the sum of \$6000 dated July 16, 1935 purchased by him from Capital now Independence Shares Corporation, a defendant herein, and on which contracts the said J. H. Van Sciver has paid in on account thereof the sum of \$3010.

(Sgd.) Harry Shapiro, Attorney for Plaintiff.

Approved: Kalodner, J.

## [fol. 458] IN UNITED STATES DISTRICT COURT

**AMENDMENT TO CAPTION AND COMPLAINT BY ADDING JAMES H. IRVIN AS PARTY PLAINTIFF—Filed May 25, 1939**

And Now, to wit, this twenty-fourth day of May, 1939, the caption of the above entitled matter is amended by adding thereto James H. Irvin as party plaintiff and by amending the complaint by adding thereto paragraph 12(b) as follows:

12(b). James H. Irvin is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of a full-paid Capital Savings Plan Contract Certificate No. B8073 in the sum of \$3000 dated February 21, 1936, purchased by him from Capital, now Independence Shares Corporation, a defendant herein, and on which the said James H. Irvin has paid in the full amount thereof.

(Sgd.) Harry Shapiro, Attorney for Plaintiffs.

Approved: Kalodner, J.

**IN UNITED STATES DISTRICT COURT****EXCEPTION TO ORDER—Filed June 2, 1939**

And Now, this twenty-ninth day of May, 1939, the defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3d, by their attorney, Robert F. Irwin, Jr., take exception to the order of the Court filed in the above on May 25, 1939, adding James H. Irvin and J. H. Van Sciver as party plaintiffs for the reason that the said order of the Court is contrary to law.

(Sgd.) Robert F. Irwin, Jr., Attorney for Defendants.

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[fol. 459]      **IN UNITED STATES DISTRICT COURT**

**EXCEPTION OF THE PENNSYLVANIA COMPANY FOR INSURANCES  
ON LIVES AND GRANTING ANNUITIES TO ORDER—Filed May  
31, 1939**

And now, to wit, this thirty-first day of May, 1939, the defendant, The Pennsylvania Company for Insurances on Lives and Granting Annuities, excepts to the order of this Court filed in the above entitled case on May 25, 1939, adding James H. Irvin and J. H. Van Sciver as parties plaintiff for the following reasons:

1. The addition of the parties plaintiff is not an amendment to the pleadings permitted by the rule of court.
2. The adding of additional parties plaintiff to give this Court jurisdiction upon the basis of the amount in controversy is contrary to law.
3. Said order is otherwise contrary to law.

Saul, Ewing, Remick & Saul, by Francis H. Bohlen,  
Jr., Attorneys for The Pennsylvania Company for  
Insurances on Lives and Granting Annuities.

## [fol. 460] IN UNITED STATES DISTRICT COURT

ORDER RESTRAINING AND ENJOINING DEFENDANTS--Filed  
June 2, 1939

And now, to wit, this second day of June, 1939, upon consideration of the motion for preliminary injunctions filed in the above-entitled matter, and on motion of Harry Shapiro, Esq., attorney for the plaintiffs, it is

Ordered, Adjudged and Decreed:

(a) That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be and hereby is restrained and enjoined from paying over, assigning, crediting, delivering, transferring or otherwise disposing of, to the other defendants, or any of them, or to any other persons or persons, directly or indirectly, in any manner whatsoever, the sum of \$38,258.85 representing certain charges made by the said other defendants in connection with the reinvestment of a certain proceeds realized from the liquidation of certain of the underlying securities of Independence Trust Shares, and from the semi-annual income from securities underlying Independence Trust Shares; and

(b) That the said other defendants and each of them, and any other person or persons, be and they hereby are enjoined and restrained from receiving from the Pennsylvania Company for Insurances on Lives and Granting Annuities, and using, directly or indirectly, in any manner whatsoever the aforesaid sum of \$38,258.85.

Security to be entered in the sum of \$1000.

By the Court, (Sgd.) Kalodner, J.

Approved as to form: Robert F. Irwin, Jr., Esq., Francis H. Bohlen, Esq.

## [fol. 461] IN UNITED STATES DISTRICT COURT

## EXCEPTION TO ORDER OF JUNE 2, 1939--Filed June 15, 1939

And now, this fifteenth day of June, 1939, the defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E.

Bonner, Horace M. Barba, and Eckley B. Coxe, 3d, by their attorney, Robert F. Irwin, Jr., take exception to the order of the Court filed in the above on June 2, 1939, restraining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying and Independence Shares Corporation from receiving the sum of \$38,258.85.

Robert F. Irwin, Jr., Attorney for Defendants.

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IN UNITED STATES DISTRICT COURT

EXCEPTION—Filed June 15, 1939

And now, to wit, this fifteenth day of June, 1939, The Pennsylvania Company for Insurances on Lives and Granting Annuities, by its attorneys, Saul, Ewing, Remick & Saul, Esquires, excepts to the order and decree of this Court entered June 2, 1939, upon the motion of the complainants for preliminary injunction.

Saul, Ewing, Remick & Saul, by Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

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[fol. 462] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 5, 1939

Notice is hereby given that Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, hereby appeal to the Circuit Court of Appeals for the Third Circuit from the order of the United States District Court for the Eastern District of Pennsylvania, restraining and enjoining Independence Shares Corporation from receiving and The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying over the sum of \$38,258.85, being that part of a distribution upon Independence Trust Shares received by The Pennsylvania Company for Insurances on Lives and Granting Annuities on or about April 1, 1939, representing certain charges made by Independence Shares Corporation in connection with reinvestment of certain proceeds realized from the liquidation of certain of the

underlying securities of Independence Trust Shares, and semi-annual income from securities underlying Independence Trust Shares then distributable, entered in this action on June 2, 1939; and from the order adding James H. Irvin and J. H. Van Sciver, as party plaintiffs, entered in this action on May 25, 1939; and from the order denying the motions of the above-named defendants to dismiss the action, referring the matter to a special master to determine the issue of solvency entered in this action May 18, 1939.

(Sgd.) Robert F. Irwin, Jr.

[fol. 463] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1939

Notice is hereby given that The Pennsylvania Company for Insurances on Lives and Granting Annuities hereby appeals to the Circuit Court of Appeals for the Third Circuit from the order of the United States District Court for the Eastern District of Pennsylvania, restraining and enjoining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying over and Independence Shares Corporation from receiving the sum of \$38,258.85, being that part of a distribution upon Independence Trust Shares received by The Pennsylvania Company for Insurances on Lives and Granting Annuities on or about April 1, 1939, representing certain charges made by Independence Shares Corporation in connection with reinvestment of certain proceeds realized from the liquidation of certain of the underlying securities of Independence Trust Shares, and semi-annual income from securities underlying Independence Trust Shares then distributable, entered in this action on June 2, 1939; and from the order adding James H. Irvin and J. H. Van Sciver, as party plaintiffs, entered in this action on May 25, 1939; and from the order denying the motion of the above-named defendant to dismiss the action and referring the matter to a Special Master to determine the issue of solvency entered in this action May 18, 1939.

Francis H. Bohlen, Jr., Saul, Ewing, Remick & Saul,  
Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 464] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO  
RELY—Filed June 15, 1939

To the Honorable Judges of the United States Circuit Court  
of Appeals for the Third Circuit:

The following is a statement of points on which the appellants, Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, intend to rely:

1. The proceedings in the District Court and the restraining order and injunction there granted in this matter are void and the Court is without jurisdiction because:

(a) The complainants named in the bill of complaint are not proper parties to bring a bill for a receiver.

(b) No one of the complainants has established a claim over \$3000.

(c) There is an improper joinder of complainants.

(d) Complainants have failed to show requisite diversity of citizenship.

(e) The complainants have no status under the Securities Act of 1933 to seek the appointment of a receiver for the defendant, Independence Shares Corporation.

2. The defendant, Independence Shares Corporation, is solvent and therefore the action should be dismissed by the District Court.

(Sgd.) Robert F. Irwin, Jr.

[fol. 465] IN UNITED STATES DISTRICT COURT

STATEMENT OF THE POINTS UPON WHICH THE APPELLANT INTENDS TO RELY—Filed June 16, 1939

To the Honorable Judges of the United States Circuit Court  
of Appeals for the Third Circuit:

The following is a statement of the points upon which the appellant, The Pennsylvania Company for Insurances on Lives and Granting Annuities, intends to rely:

1. The proceedings in the District Court and the restraining order and injunction granted there in this matter are void and the Court is without jurisdiction because:
  - (a) The amount in controversy is less than \$3000 exclusive of interest and costs.
  - (b) There is lack of the required diversity of citizenship.
  - (c) The Court has no power under the Securities Act of 1933 or under its general equitable powers to grant the relief sought by the complainants.
2. The bill of complaint failed to allege any facts justifying the transfer of the trust assets to a receiver appointed for Independence Shares Corporation for the purpose of liquidation or for any other purpose.
3. The complainants have no status under the Securities Act of 1933 to seek relief as against The Pennsylvania Company for Insurances on Lives and Granting Annuities or to pursue remedies vested solely in the Securities and Exchange Commission.
4. The Pennsylvania Company for Insurance on Lives and Granting Annuities is improperly joined as party defendant.

[fol. 466] 5. The complainants have separate and adequate remedies at law.

6. The additional complainants were improperly joined.

Saul, Ewing, Remick & Saul, by Francis H. Bohlen,  
Jr., Attorneys for Appellant.

[fol. 467] Clerk's certificate to foregoing transcript  
omitted in printing.

[fol. 468] IN THE UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

1939

No. 7146

INDEPENDENCE SHARES CORPORATION, et al., Appellants,

vs.

ROBERT J. DECKERT, et al., Appellees

Petition for Supersedeas and Stay of Proceedings

The Petition of Independence Shares Corporation respectfully represents:

1. That it is one of the defendants in Robert J. Deckert et al. v. Independence Shares Corporation et al, 218 of Civil Action of 1939 in District Court of United States for the Eastern District of Pennsylvania and is named as a principal defendant in Bill of Complaint.
2. That Independence Shares Corporation is a Pennsylvania corporation engaged in the business of buying common stocks of 35 specific corporations in units of one share of each of such stocks, depositing such unit with The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, and receiving in exchange therefor 1,000 Independence Trust Shares for each such unit so deposited.
3. That Independence Shares Corporation, as a part of its business, sells Independence Trust Shares, and in addition, it and its predecessor Capital Savings Plan, Inc. is and were in the business of issuing and selling plans and contracts to Investors under the terms of which plans or [fol. 469] contracts the Investor could make a lump sum payment or installment payments to a Custodian or Trustee to be applied after certain authorized deductions to the purchase of Independence Trust Shares for the account of the individual Investor. Some of the contracts formerly issued by Capital Savings Plan, Inc. and now outstanding were issued with life insurance features insuring the unpaid balances due on such insured contracts at the time of the death of such Investor.

4. That The Pennsylvania Company for Insurance on Lives and Granting Annuities is Trustee of the common stocks underlying Independence Trust Shares and is Trustee under several trust agreements, relating to the contracts formerly issued by Capital Savings Plan, Inc. and is custodian under the plans issued by Independence Shares Corporation.

5. That the Independence Trust Shares held by The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee or Custodian, are held as the sole property and for the separate account of the Investors. The Independence Trust Shares certificates for Investors are issued in the name of The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee or Custodian, and a separate card record for each Investor, showing the number of trust shares to which he is entitled, to five decimal places, is kept by said Trustee or Custodian.

6. That the Bill of Complaint seeks a receivership of the assets of Independence Shares Corporation, all Independence Trust Shares issued, and all common stocks underlying Independence Trust Shares.

7. That your petitioner is informed by counsel, believes and therefore avers that the Independence Trust Shares and the common stocks underlying Independence Trust [fol. 470] Shares are not the assets of Independence Shares Corporation and are in no way subject to claims against Independence Shares Corporation but are the sole property of the persons who own them or for whose account they are held.

8. That there are outstanding approximately 2,000,000 trust shares of which approximately 1,700,000 are held for the account of approximately 18,000 Investors and approximately 300,000 are held independently of Investors holding contracts issued by Capital Savings Plan, Inc. and Plans issued by Independence Shares Corporation. Only nine holders of Capital Savings Plan contracts originally joined as parties plaintiff in the Complaint herein; two additional Capital Savings Plan, Inc. contract holders have been joined by Order of the District Court, to which Order your petitioner has taken exception.

9. That the Independence Shares Corporation is in the business of selling securities and is therefore especially

jealous of its reputation and, as such, is subject to extraordinary damaging consequences for actions reflecting upon its financial standing and business reputation.

10. That on June 2, 1939 the Court below entered an Order restraining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying and the Independence Shares Corporation from receiving the sum of \$38,258.85, being the amount due by The Pennsylvania Company for Insurances on Lives and Granting Annuities to the Independence Shares Corporation.

11. That pending the disposition of the appeal the Court below has ordered the defendant, Independence Shares Corporation, to proceed to the taking of testimony before a Master [fol. 471] appointed by Order of May 18, 1939 and at a hearing on June 20, 1939 stated that such hearings should be concluded so that the Master's report would be filed within two or three weeks from that date.

12. That unless your petitioner's appeal raising the fundamental question of the jurisdiction of the court below is made a supersedeas, there is grave danger of the court below acting on the pending motion to appoint a receiver. Any action by the court below in appointing a receiver would cause irreparable damage to your petitioner which could never be compensated for by a judgment of your Honorable Court on the appeal reversing the lower court.

13. That your petitioner believes that the civil action of the complainants is without legal justification and that the appointment of a receiver for the assets of the Independence Shares Corporation, the Independence Trust Shares belonging to each owner and Investor, and the common stocks underlying Independence Trust Shares, prior to disposition of the pending appeal, would cause irreparable harm to your petitioner and the 18,000 Investors.

14. That the appointment of a receiver would force the defendant, Independence Shares Corporation, to breach its contractual obligations to Investors and other owners of Independence Trust Shares, and cause The Pennsylvania Company for Insurances on Lives and Granting Annuities to break its contractual obligations with the said Investors and owners, thus causing irreparable harm and damage to the individual Investors and owners of Independence Trust

Shares and to the business, reputation and financial standing of the defendant, Independence Shares Corporation.

15. That the appointment of a receiver would cause the lapse of the blanket term life insurance policy, insuring unpaid balances due on insured contracts now held by approximately [fol. 472] 1,000 Investors, which policy, in such event, could not be reinstated or replaced, to the irreparable damage of the 11,000 Investors.

16. That this petition is not interposed for delay, but is for the purpose of obtaining relief from possible irreparable injury caused by the continuance of the proceedings in the Court below pending disposition of the appeal.

Wherefore, your petitioner prays this Honorable Court to grant a supersedeas and direct that the District Court of the United States for the Eastern District of Pennsylvania be ordered to stay proceedings in the matter of Robert J. Deckert et al. v. Independence Shares Corporation et al.

And your petitioner will ever pray, etc.

Independence Shares Corporation, by Alfred H. Geary, President.

[fol. 473] STATE OF PENNSYLVANIA,  
County of Philadelphia, ss:

Alfred H. Geary, being duly sworn according to law, deposes and says that he is President of Independence Shares Corporation, petitioner named in the foregoing petition; that he is authorized to make this affidavit on its behalf; that he has read the foregoing petition and believes that the facts set forth therein are true and correct to the best of his knowledge; information and belief.

Sgd. Alfred H. Geary.

Sworn to and subscribed before me this 24 day of June, 1939. Crawford A. Battle, Notary Public.  
My Commission Expires March 9, 1943. (Seal.)

Endorsements: Petition for Supersedeas and Stay of Proceedings. Received & Filed, June 27, 1939. William P. Rowland, Clerk.

[fol. 474] IN THE UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

No. 7146

INDEPENDENCE SHARES CORPORATION, et al., Appellants,

vs.

ROBERT J. DECKERT, et al., Appellees

1939

JOINDER IN PETITION FOR SUPERSEDEAS

The Pennsylvania Company for Insurances on Lives and Granting Annuities joins in the petition of Independence Shares Corporation for a supersedeas for the following reasons:

1. It is trustee or custodian for approximately 18,000 holders of Capital Saving Plan Contract Certificates and Independence Trust Shares Purchase Plans and also trustee for 1418 holders of Independence Trust Shares, 1414 of whom have no connection with Capital Savings Plan Contract Certificates or Independence Trust Shares Purchase Plans.
2. In its capacity as trustee or custodian aforesaid, it holds trust assets having a value in excess of \$4,000,000 and neither Independence Shares Corporation nor any of the other defendants, except to the extent that they may hold a limited amount of Independence Trust Shares, have any right, title or interest in and to said trust assets.
3. The Complainants, the Appellees in this appeal seek the appointment of a receiver of Independence Shares Corporation with the power to take possession of the trust assets, and The Pennsylvania Company for Insurances on Lives and Granting Annuities as trustee or custodian would as trustee be in duty bound to refuse to deliver any of the trust assets in its hands to a receiver unless and until this Court upon appeal, affirmed any order or decree directing [fol. 475] any such remedy.
4. In view of the above, The Pennsylvania Company for Insurances on Lives and Granting Annuities submits that the power of the Court below to grant any such drastic remedy should first be determined by this Court, and that

pending such determination the rights and interests of said beneficiaries should be safeguarded by staying further proceedings in the Court below.

Wherefore The Pennsylvania Company for Insurances on Lives and Granting Annuities respectfully urges that this Court grant a supersedeas in this case.

Saul, Ewing, Remick & Saul, by Francis H. Rohler, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

Endorsements: Joinder in Petition for Supersedeas. Received & Filed, Jun. 28, 1939. William P. Rowland, Clerk.

[fol. 476] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE THIRD CIRCUIT

No. 7146. March Term, 1939

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY,  
et al., Appellants,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees

No. 7147. March Term, 1939

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND  
GRANTING ANNUITIES, Appellant,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees

And afterwards, to wit, the 7th day of July, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Petition for Supersedeas, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Francis Biddle, Circuit Judges, [and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the — day of — come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:] \*

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\* [Words enclosed in brackets struck out in copy.]

[fol. 477] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 7146. March Term 1939

INDEPENDENCE SHARES CORPORATION, et al., Appellants

vs.

ROBERT J. DECKERT, et al., Appellees

Before Biggs, Clark and Biddle Circuit Judges

ORDER DENYING PETITION FOR SUPERSEDEAS, ETC.

After due consideration it is ordered that the petition of Appellants for Supersedeas and stay of proceedings in the District Court be and the same is hereby denied.

Philadelphia, July 7, 1939.

Francis Biddle, Circuit Judge.

Endorsements: Order Denying Petition for Supersedeas, etc. Received & Filed, Jul. 7, 1939. William P. Rowland, Clerk.

[fol. 478] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 7146. March Term, 1939

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, et al.,  
Appellants,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees

No. 7147. March Term, 1939.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND  
GRANTING ANNUITIES, Appellant,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees

And afterwards, to wit, the 7th and 9th days of August, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Charles Alvin Jones, Circuit

Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 11th day of November, 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 479] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE THIRD CIRCUIT

No. 7146. MARCH TERM, 1939

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY,  
Frank McCown, Jr., Robert E. Bonner, Horace M. Barba  
and Eckley B. Coxe, 3d, Appellants,

v.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON,  
R. G. Cadman, James L. Gleason, Samuel Miller, Irene R.  
Randal, Joseph Laky, and Abe Zubrow, Appellees

No. 7147. MARCH TERM, 1939

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND  
GRANTING ANNUITIES, Appellant,

v.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON,  
R. G. Cadman, James L. Gleason, Samuel Miller, Irene R.  
Randal, Joseph Laky and Abe Zubrow, Appellees,

Appeals from the District Court of the United States for the  
Eastern District of Pennsylvania

OPINION—Filed November 11, 1939

[fol. 480] Before Biggs, Clark and Jones, Circuit Judges

BIGGS, Circuit Judge:

A bill of complaint was filed in the court below by the appellees against the appellant, Independence Shares Corporation, a Pennsylvania corporation, and certain affiliated companies. The appellees purchased Capital Savings Plan

Contract Certificates issued by Capital Savings Plan, Inc., and have alleged in their bill of complaint that these were sold to them by the fraud and misrepresentations of Capital Savings Plan, Inc., by the use and means of instruments of transportation or communication in interstate commerce and by the use of the mails. At the time of the sales, Independence Shares Corporation was a wholly owned subsidiary of Capital Savings Plan, Inc. Upon December 31, 1938, however, Capital Savings Plan, Inc., and Independence Shares, Inc., merged and the appellant, the resultant corporation, acquired all of the assets and assumed all of the liabilities of Capital Savings Plan, Inc.

The bill of complaint also alleges that the assets of Independence Shares Corporation are being wasted and dissipated and that that corporation is insolvent. The bill prays the appointment of a receiver for the assets of the corporation who shall ascertain and adjudicate the claims of creditors and shall liquidate and dissolve the company. The complaint also asks for certain injunctive relief which we will discuss at a later point in this opinion. The bill is cast in the form of a class suit brought by the appellees not only on their own behalf but also for the benefit of all certificate holders similarly situated.

The court below denied motions to dismiss the bill of complaint made upon the ground that it stated no cause of action and that the court was without jurisdiction, and referred the case to a master to hear and report upon the question of solvency or insolvency of the appellant. This order, filed May 18, 1939, has been appealed from by Independence Shares Corporation.

[fol. 481] The contract certificates purchased by the appellees called for payments to be made by the subscribers. These payments were made by the subscribers to the other appellant, The Pennsylvania Company for Insurances on Lives and Granting Annuities as trustee. The Pennsylvania Company made certain deductions from the sums paid to it and invested the balance as directed by Independence Shares Corporation in Independence Trust Shares for the accounts of the respective certificate holders. Independence Shares Corporation created these trust shares by itself purchasing the shares of stock of certain specified corporations. The trust shares represent interests in the stocks so bought. The Pennsylvania Company in turn purchased aliquot portions of the trust shares and holds its purchases

as we have stated for the benefit of the accounts of the certificate holders. At the time of the filing of the bill of complaint a sum of money representing charges made by the appellant for the reinvestment of funds was in the possession of The Pennsylvania Company. By an order entered June 2, 1939, the court below enjoined The Pennsylvania Company from paying over the sum referred to to Independence Shares Corporation or otherwise disposing of it during the pendency of the action. The Pennsylvania Company has appealed from this order.

Since the two appeals grow out of the same set of facts, we will dispose of them in one opinion.

The complainants with one exception are citizens of Pennsylvania. The jurisdiction of the court below cannot be sustained therefore upon diversity of citizenship. Lee v. Lehigh Valley Coal Company, 267 U. S. 542; Salem Trust Co. v. Manufacturers Finance Company, 264 U. S. 182; Osthaus v. Button, 70 F. (2d) 392. Nor does the amount in controversy exceed the sum of \$3,000. Section 24(1) of the Judicial Code as amended, 28 U. S. C. A. 41(1). The claims of the appellees may not be aggregated and the claim of no one appellee amounts to more than \$2,000. Moore's [fol. 482] Federal Practice, Vol. 2, Section 23.08; Pinel v. Pinel, 240 U. S. 594; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77.

In our opinion, none the less, the court below had jurisdiction of the controversy by virtue of the provisions of Sections 12(2) and 22(a) of the Securities Act of 1933 (May 27, 1933, c. 38, Title I, 48 Stat. 84 and 86 (15 U. S. C. A. 771.(2) & 77v.(a)).

Section 22(a) provides that "The district courts of the United States, \* \* \* shall have jurisdiction of offenses and violations under this title \* \* \* and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title \* \* \*".

Section 12(2) of the Act states that "Any person who \* \* \* sells a security \* \* \* by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, \* \* \* and who shall not sustain the burden of proof that he did not know, \* \* \*

of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Jurisdiction in this case, however, is not dependent upon diversity of citizenship and amount in controversy. The field which is carved out for the operation of federal jurisdiction by Section 22(a) is "all suits in equity and actions at law brought to enforce any liability or duty created by this title." Since the Act stems from the exercise of federal power under the commerce clause there is no question raised in the case on the line of power.

[fol. 483] Section 12(2) of the Securities Act therefore provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce and that such a suit may be maintained by the aggrieved person in an action at law or by a bill in equity depending upon whether the cause of action is cognizable at law or in equity. At the present time, the remedy of the aggrieved person is in the "civil action" prescribed by Rule 2 of the Federal Rules of Civil Procedure. The nature of the suit, however, remains as specified by Section 12(2). The defrauded person must seek to recover "the consideration" paid by him. The relief given by the section is for a money judgment or for a money decree payable to the individual who has been defrauded.

Section 16 of the Act, 48 Stat. 84, (15 U. S. C. A. 77p.) providing that "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity", does not relate to venue as indicated by the court below or enlarge the remedy given by Section 12(2). Congress by the language employed sought only to make it abundantly clear that it was not preempting this field to the federal jurisdiction, thereby prohibiting recovery to defrauded individuals under the law of the states as that existed prior to the passage of the Securities Act.

Since the recovery of the appellees is limited as we have indicated, it follows that The Pennsylvania Company is not

a proper party to the suit. The appellees have stated no cause of action against it and indeed have alleged no breach of duty upon its part cognizable under the Securities Act or otherwise. The injunction against The Pennsylvania Company therefore may not be maintained. Nor does Section [fol. 484] 12(a) enlarge the right of the appellees to the appointment of a receiver for the corporation upon the ground that it is insolvent or its assets are being dissipated. The law in this respect remains as it was. See Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497, and the authorities there cited. It follows that none of the prayers of the bill of complaint asking for specific relief may be granted.

The complaint states a cause of action within the purview of Section 12(2) of the Securities Act, however, and ends with a general prayer for relief. Amendment may be made to the complaint pursuant to R. S. 954 (28 U. S. C. A. 777) and Rule 15(a) of the Rules of Civil Procedure by limiting this prayer to a demand for money judgment. Such an amendment would be one of form rather than of substance since the complaint sets forth every fact necessary to entitle the appellees to obtain such relief. It is clear from the complaint that the appellees seek the recovery of the consideration paid by them for their contract certificates and by the contents of the complaint Independence Shares Corporation is made fully aware of the charges which it must meet. United States v. Powell, 93 F. (2d) 788. See McAndrews v. C. L. S. & E. R. Co., 162 F. 856. As was stated by the Supreme Court in Maty v. Grasselli Chemical Co., 303 U. S. 197, 200, "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."

The complaint sets forth a cause of action at law rather than in equity, for while Independence Shares Corporation may occupy a fiduciary relationship toward the appellees and the other certificate holders, none the less the action given by Section 12(2) of the Securities Act is one against the seller of the securities for the recovery of money. The type of amendment from equity to law formerly permitted under Equity Rule 22 is no longer necessary in view of Rule 2 of the Rules of Civil Procedure. The complaint as amended will serve as a continuation of the old suit, the [fol. 485] filing of the original bill tolling the statute of limitations imposed by Section 13 of the Securities Act (15 U. S.

C. A. 77(m)). See Friederichsen v. Renard, 247 U. S. 207, 213 and the decisions there cited. It must also be borne in mind that under Rule 15(c) of the Rules of Civil Procedure, an amendment when made relates back to the date of the original pleading.

The question of whether the appellees upon a proper showing might not obtain injunctive relief against Independence Shares Corporation in aid of the remedy supplied to them by Section 12(2) of the Act, is not before us and therefore we do not pass upon it.

In conclusion we state that the appellants contend that Section 12(2) of the Act gives the appellees no right to maintain their suit as a class action. We are unable to agree with this contention. The suit at bar is of the type denominated a "spurious" class suit and may be maintained under Rule 23(a)(3) of the Federal Rules of Civil Procedure. See Moore's Federal Practice, Vol. 2, p. 2241, paragraph 23.04-(3). In the case at bar numerous persons are interested in common questions of law or fact affecting the several rights of many individuals. Common relief may be sought<sup>1</sup> despite the fact that individuals may recover separate judgments different in amounts. It should be noted that the misrepresentations set forth by the bill are alleged to be common to the sales made by the agents of the appellant company and of Capital Savings Plan, Inc. to the appellees and the other subscribers upon whose behalf the suit was instituted. We do not at this time express an opinion upon the question whether subscribers who are not now named as parties plaintiff may intervene in the cause in view of the statute of limitations set up in the Act.

[fol. 486] Accordingly the orders appealed from are reversed and the cause is remanded with directions to proceed in conformity with this opinion.

A true Copy:

Teste:

\_\_\_\_\_, Clerk of the United States Circuit Court  
of Appeals for the Third Circuit.

<sup>1</sup> Moore's Federal Practice states in respect to "spurious" class suits: "This is a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clean up a litigious situation."

[fol. 487] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7146

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY,  
Frank McGown, Jr., Robert E. Bonner, Horace M. Barba  
and Eckley B. Coxe, 3d, Appellants,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON,  
R. G. Cadman, James L. Gleason, Samuel Miller, Irene  
R. Randal, Joseph Iaky and Abé Zubrow, Appellees

Appeal from the District Court of the United States, for  
the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record  
from the District Court of the United States, for the  
Eastern District of Pennsylvania, and was argued by  
counsel.

On consideration whereof, it is now here ordered, ad-  
judged, and decreed by this Court that the orders of the said  
District Court appealed from in this cause be, and the same  
are hereby reversed, with costs, and the cause remanded to  
the said District Court with directions to proceed in con-  
formity with the opinion of this court.

Philadelphia, November 11, 1939.

John Biggs, Jr., Circuit Judge.

Endorsements—Order Reversing Orders of District  
Court. Received & Filed Nov. 11, 1939. Wm. P. Rowland,  
Clerk.

[fol. 488] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7147

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND  
GRANTING ANNUITIES; Appellant,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zabrow, Appellees

Appeal from the District Court of the United States, for  
the District of Pennsylvania

This cause came on to be heard on the transcript of record  
from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders of the said District Court appealed from in this cause be, and the same are hereby reversed, with costs, and the cause remanded to the said District Court with directions to proceed in conformity with the opinion of this court.

Philadelphia, November 11, 1939.

John Biggs, Jr., Circuit Judge.

Endorsements—Order Reversing Orders of District Court  
etc. Received & Filed Nov. 11, 1939. William P. Rowland,  
Clerk.

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[fol. 490] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7146

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY,  
Frank McCown, Jr., Robert E. Bonner, Horace M.  
Barba and Eckley B. Coxe, 3d, Appellants,

v.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, Appellees

No. 7147

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND  
GRANTING ANNUITIES, Appellant,

v.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow, Appellees

ANSWER TO PETITION FOR REHEARING

To the Honorable, the Judges of the Circuit Court of Appeals for the Third Circuit:

The answer of the appellants, Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert [fol. 491] E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, to the petition for rehearing filed by the appellees in the above-entitled matter, respectfully represents:

1. The appellants aver that the allegations set forth by appellees in their petition for rehearing are irrelevant to a consideration of whether a rehearing should be granted, and in view of certain mis-statements contained in the petition, the appellants feel that, while these statements are irrelevant to a determination of the question before the Court, they cannot let such statements go unchallenged.

2. The appellees in their petition have stated that

"Independence Shares Corporation has neither challenged, disputed nor denied the facts on the basis of which

Judge Kalodner entered the order enjoining the receipt by it of the \$38,258.85"

and that

"Since the defendants have neither challenged, disputed nor denied the findings of fraud in connection with their stock-selling scheme"

and that

"Independence Shares Corporation does not challenge, dispute or deny that the charges \* \* \* were concealed from and deliberately misrepresented to your petitioners".

The appellants deny the correctness of the above-quoted statements, and the appellants have always denied that there existed fraud or misrepresentations in the sale of the securities by them, and in the answer filed in the Court below (R. pp. 56-110) all allegations of fraud and misrepresentation averred in the appellees' complaint have been denied.

3. Appellees in their petition for rehearing have stated as a fact that Judge Kalodner held

[fol. 492] "that Independence Shares Corporation was liable to all subscribers for the money paid in by them".

No such finding was made in the Court below as is evidenced by what the Judge said in open court following the filing of his written opinion and in answer to a request by appellees' counsel based upon the assumption that Independence Shares Corporation was liable to all subscribers. At page 396 of the record the following appears:

"The Court: If there was fraud and misrepresentation, concealment as to material facts of which the plan holders were ignorant. It must be subject to that reservation. There may be persons in this case—I am not passing finally on it—there may be persons in this case to whom no misrepresentation was made, or concealment of facts. If so, unless there is liquidation of the company, they have no complaint."

4. The appellees have had one rehearing in this matter and at the conclusion thereof, the Court asked the attorney for the appellees whether he had stated everything he wished to and the answer was in the affirmative.

There has been a complete presentation of the questions involved in this case and the Court decided these questions. There nowhere appears in the appellees' petition for rehearing any reason for this Court to rehear this matter which has been argued before this Court twice.

Wherefore, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted, Robert F. Irwin, Jr., George M. Kevlin, Joseph Whetstone, Harris J. Latta, Jr., Donahue, Irwin, Merritt & Gest, Townsend, Elliott & Munson.

[fol. 493] The Pennsylvania Company for Insurances on Lives and Granting Annuities, appellant, also respectfully requests the Court to deny the petition for rehearing.

Walter B. Saul, Francis H. Bohlen, Jr., Saul, Ewing, Remick & Saul.

[fol. 494]-IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7146

INDEPENDENCE SHARES CORPORATION, et al., Defendants-  
Appellants,

vs.

ROBERT J. DECKERT, et al., Plaintiffs-Appellees

Sur Petition for Rehearing

And Now, to wit, December 20, 1939, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —

John Biggs, Jr., Circuit Judge.

Endorsements: Order Denying Petition for Rehearing.  
Received & Filed Dec. 20, 1939. William P. Rowland, Clerk.

[fol. 495] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7147

PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANT-  
ING ANNUITIES, Defendant-Appellant,

vs.

ROBERT J. DECKERT, et al., Plaintiffs-Appellees  
Sur Petition for Rehearing

And Now, to wit, December 20, 1939, after due consideration,  
the petition for rehearing in the above-entitled case is  
hereby denied.

Philadelphia, —.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Denying Petition for Rehearing.  
Received & Filed Dec. 20, 1939. William P. Rowland, Clerk.

[fol. 496] UNITED STATES OF AMERICA,  
Eastern District of Pennsylvania,  
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the cases of Independence Shares Corporation, et al., Appellants, vs. Robert J. Deckert, et al., Appellees, No. 7146; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, appellant, vs. Robert J. Deckert, et al., appellees, No. 7147; on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of January in the year of our Lord one thousand nine hundred and forty, and of the Independence of the United States the one hundred and sixty-fourth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

## [fol. 497] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 17

## ORDER ALLOWING CERTIORARI—Filed March 25, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration and decision of this application.

## [fol. 498] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 18

## ORDER ALLOWING CERTIORARI—Filed March 25, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration and decision of this application.

Endorsed on cover: File Nos. 44,140, 44,141. U. S. Circuit Court of Appeals, Third Circuit. Term No. 17. Robert J. Deckert, Roland W. Randal, David W. Compton, et al., Petitioners, vs. Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., et al. Term No. 18. Robert J. Deckert, Roland W. Randal, David W. Compton, et al., Petitioners, vs. The Pennsylvania Company for Insurance on Lives and Granting Annuities. Petition for writs of certiorari and exhibit thereto. Filed February 17, 1940. Term Nos. 17, O. T., 1940; 18, O. T., 1940.

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